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No. 0

Supreme Court, U.S.
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In The

Supreme Court of the United States

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STEPHEN GOODIN,

Petitioner,

vs.

FRANCIS J. HARVEY, SECRETARY OF THE ARMY,
IN HIS OFFICIAL CAPACITY,

Respondent.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

◆

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the circuit court use the proper standard of evidence for establishing that an employer's asserted nondiscriminatory reason for a promotion decision is pretextual?

(2) Does a decision maker's statement, divulging an unlawful employment consideration (gender) was a motivating factor, constitute evidence of discrimination?

LIST OF PARTIES

Petitioner (plaintiff and appellant below)

Stephen Goodin
1130 Midland Way
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Respondents (defendants and appellees below)

Secretary of Defense,
FRANCIS J. HARVEY,
Secretary of the Army, in his official capacity,
Defendant/appellee

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stephen Goodin respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 21, 2008.

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OPINIONS BELOW

The August 21, 2008 opinion of the court of appeals, Appeal Number: 08-10684-EE, is set out at pp. App. 1-5 of the Appendix. The February 1, 2008 Order of the District Court for the Northern District of Georgia, Civil Action File No. 1:06-CV-0646-BBM, is set out at pp. App. 6-26 of the Appendix. The December 28, 2007 Order for the Service of Report and Recommendation of United States Magistrate Judge for the Northern District Court of Georgia, Civil Action File No. 1:06-CV-0646-BBM, is set out at pp. App. 27-72 of the Appendix.

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STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 21, 2008. There has been no request for rehearing or rehearing "en banc" before the United States Court of Appeals for the Eleventh Circuit, nor has there been a request to extend the time to file this petition for a Writ of Certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . , as is enjoyed by white citizens. . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

U.S. Const. amend. XIV.

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STATEMENT OF THE CASE

- Overview

This case concerns a GS14 position, (advertised in June 2004, cancelled in September 2004, then retailored and readvertised in October 2004,) with the actual promotion made in January of 2005 for a key position of Quality Assurance, QA, Manager in the regional office of the U.S. Army Corps of Engineers ("Corps") in Atlanta, Georgia. This Corps office normally oversees about one billion dollars of annual design and construction of Army and Air Force projects on military installations and civil works projects along waterways and beaches of the southeast, but in 2004 and 2005 the workload of the military installation program was projected to double or triple until 2011. The largest increase in workload and changes in business processes since WWII were occurring because of the Corps' support to Army restructuring and the Global War on Terrorism.

The petitioner, Goodin, is a white male with two college degrees that is a registered architect with broad design and construction quality assurance experience and 27 years of exceptionally rated service within the Corps. The QA vacancy was filled by, a white female with two college degrees that is a registered engineer with 25 years of similar rated service within the Corps, but with most of her experience being in the civil works "planning" program of the Corps. After not being selected for the position, experiencing unfairness that had occurred in the selection process, and approached by another white male candidate for the position who expressed similar concerns; Goodin filed his discrimination complaint. In his entire career, Goodin has never previously filed any type complaint, whatsoever. This case is not about a qualifications comparison with the person selected, although Goodin believes he was the much more logical choice for the function of the position as it existed then and today. This case is about the fact that the selection decisions and the process leading up to it were made based on unlawful criteria, gender.

After a period of discovery within his own agency, filing this lawsuit, then more discovery where even more specific discriminatory evidence was revealed, various plaintiff and defendant briefs were submitted at the Magistrate court level, with the defendant's motion for summary judgment granted. Subsequent briefs were followed with district court granting summary judgment against plaintiff by stating that the decision maker, Smith's, remarks were not direct evidence because it did not meet court's definition of direct evidence and then analyzing Goodin claim under the (easier to dismiss) burden shifting approach set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). App. 11. Circuit court affirmed "for reasons given in the district court's order" App. 5. The case has never been heard by a jury and never allowed oral argument in any court.

In briefs and orders, the parties have offered sharply conflicting interpretations of the evidence. The questions presented by this petition, and addressed by the court of appeals, concern the legal sufficiency of the type of evidence introduced by the plaintiff, but questions presented by this petition also concern the legal sufficiency of the court of appeals standards.

– Summary of Key Material Elements of the Case

Following are presentations of three key material elements of the evidence which have essentially repeated in conflict from court to court; A. first is the decision maker's statement, B. secondly the supporting circumstantial evidence, and C. third and lastly, the context and corporate environment surrounding the promotion selection which disfavored "white males" and was drastically seeking to increase the selections and promotions of women and minorities.

A. First, there is the statement of Chris Smith who was the position's supervisor, the promotion selection team leader and key decision maker, who under oath, admitted a discriminatory motivation, (gender) for the specific employment promotion selection in this case.

The district court claimed Smith's remarks could not be evidence because they were "A single isolated comment. . . ." App. 19. Contrary to that district court statement (and not even considering the extensive amount of circumstantial evidence and prejudiced corporate environment evidence presented in this case); Smith's statements were carefully made while being questioned during an October 25, 2005, Department of Defense (DOD) EEO investigation of the selection process complaint regarding the specific QA promotion selection in this case; a verbatim transcript of the questions and sworn testimony of Christopher Smith was taken. In it, Smith testified he had written his end of year performance accomplishment and identified his "achievement" that he had hired a white female; and it is presumed that Smith's immediate supervisor, Greg Baer, would have also reviewed and concurred with Smith. App. 68-69.

The portion of the exchange between Goodin and Smith's revealing testimony, regarding his end of year performance accomplishments, in relation to the specific promotion selection follows: App. 68.

Mr. Goodin: So, when you filled out your end of the year performance accomplishments –

Mr. Smith: I had to.

Mr. Goodin: – did you list Susie Vohlken as one of your accomplishments in that arena.?

Mr. Smith: That I participated on panels and, yes, I did hire a white female, correct.

Mr. Goodin: Don't you agree that that gives you points, positive points, that can contribute to your overall performance rating?

Mr. Smith: It was an achievement. So, yes, I guess it would be looked favorably upon.

We therefore have the action of Smith, the position's supervisor, leading the selection panel, his action in leading the panel in selecting a female, and from his testimony above, we also know that Smith took the action of writing the hiring of a female in his official end of year performance accomplishments. This begins to show how much more there is than "A single isolated comment. . . ."

The court stated that Smith's remarks do not meet the definition of direct evidence because they would require "further inference" by a jury. App. 11. App. 19. If all Goodin was able to present, was a photocopy of Smith's 2005 written end of year performance accomplishments, then the lower court could accurately state that it would require a jury to make "further inference" as to whether Smith based his employment decision on a discriminatory motive or intent.

Because, that type proof of discriminatory intent requires evidence concerning the decision maker's state of mind and no testimony, except from one person, the decision maker, can offer direct evidence of his own state of mind. *United States v. Garber*, 589 F.2d 843, 849 n.8 (5th Cir. 1979) (explaining that another witness cannot offer direct evidence of another person's state of mind; only that person can provide direct evidence of his own state of mind).

Fortunately, that direct evidence of Smith's state of mind and intent are provided in Smith's own testimony, where he reveals through his own words, his state of mind and discriminatory motivation, (gender) for the specific employment promotion selection in this case. With all present, Smith, a DOD EEO investigator, a stenographer, Goodin and an attorney representing the Corps of Engineers; Smith's sworn statements were carefully made while being individually questioned regarding the specifics of the QA promotion selection, in this case. With due respect to the lower courts, who stated they are "stray remarks" requiring additional inference; Smith's remarks are direct testimony plain and clear on its face. Smith reveals his state of mind, by picking his own words to describe and admit his actions, thoughts and motivation to hire a female. Smith considered it a job related "achievement," and took ownership for the decision, that "yes 'I' did hire a 'female'" for which he also believed he would be "favorably" rewarded as part of his personal end of year performance evaluation. Smith, in his own words and testimony above, admits his selection motivation of selecting a "female."[1]

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[1] Smith apparently believed that the Corps' corporate policy encouraged selection of particular protected classes. It is presumed that Smith's immediate supervisor, Greg Baer, as the approving official, for Smith's end of year "accomplishments" would have also concurred with the reasoning for Smith's listing the hiring of a female as an "achievement." App. 68 & 69.

It is clear from the transcript that the questioner did not use the term "female" in asking Smith the question on his accomplishments for the year. Goodin asked Smith a question regarding his hiring of the person, Susan Vohlken, and it was Smith who corrected him in that his accomplishment was in hiring a "female," Smith's statement refers directly to the immutable characteristic of sex, and nothing more. There is nothing even remotely in Smith's statements that would suggest the promotion was made for reasons other than gender or that Smith was seeking favorable job consideration for making the promotion decision on grounds other than gender.

Substituting a different protected class in the decision maker's statement is a method used by this and other courts to illustrate what kind of statements constitute direct evidence. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1190 (11th Cir. 1997) (Collecting "direct evidence" examples and demonstrating the existence of direct evidence by substituting different protected classes in the decision maker's statement). Under the theory of the lower court, it would be of no significance for a hiring manager, such as Smith, to emerge from a selection panel, and hold a townhall meeting of all employees, to explain his selection and then proclaim to them that he considered it an achievement to have hired a "white man" or a "man" or a "Christian"; and it would also be of no significance for that same manager to further proclaim to his employees that he also expected a "favorable" end of year performance appraisal from the corporation and receive a resulting monetary performance award for making that specific selection of a "white man" or a "Christian."

If, for example, a decision maker stated that it was an achievement for him to have promoted a white person, or that it was an achievement to have promoted a man, then the decision maker is plainly and unmistakably stating that the achievement is promoting a person based upon an immutable characteristic. See *De Paula v. United States AG*, 2008 U.S. App. LEXIS 5663 (11th Cir. 2008) (An "immutable characteristic is . . . one that members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."); *Castillo-Arias v. United States AG*, 446 F.3d 1190, 1196 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 977, 166 L. Ed. 2d 709 (2007) 1. If it can be an achievement to have hired a "female," then it can also be an achievement to have hired a White person for a positive. If it is an achievement to have hired a "female," then an employer can make it a policy that employees fail to achieve their objectives if they hire a male.

Basing an employment decision upon an immutable characteristic is the exact conduct the statute prohibits. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998). If the decision maker states that it was an achievement to have hired someone with this person's experience in a specific type of construction, or it was an achievement to have hired someone who attended an Ivy League school, or it was an achievement to have hired one who was well-respected among his colleagues, then the reference point would clearly be a "business decision," i.e. something other than the immutable characteristic of race or gender.

In this circumstance, the decision maker only mentioned the immutable characteristic of sex as the basis for the promotion decision. Smith did not cite anything that could remotely be considered a "business decision." This is not a circumstance where Goodin is asking the court to sit as a super-personnel department reviewing an employer's business decisions. This is a circumstance where the most significant decision maker has, under oath, identified the immutable characteristic of sex as the basis for the decision and sought favorable job consideration for making a decision based upon this immutable characteristic, i.e. gender. Where, as here, the promotion decision is an achievement because of the candidate's race or gender – an immutable characteristic – establishes discriminatory intent without the need of inference or additional evidence.

Likewise, in the instant case, Goodin has introduced substantial evidence that Smith played an integral, if not the most integral, role in the decisional process. *Legitimizing such conduct by a senior level government decision maker, as the lower court did, is dangerous because it officially approves, incorporates, and institutionalizes discrimination as the corporate policy of the employer – in this case the United States government.* Promoting an individual based upon sex violates the law, which condemns sex discrimination as impermissible. The law does not recognize promoting a person based upon their sex as an "achievement," *nor* as something deserving of a performance and monetary award.

It is important to note that at no time whatsoever in his deposition or in his sworn affidavit or declaration did Smith deny his clear discriminatory statement, i.e. that he sought a favorable job consideration for having promoted a female. The United States Department of Justice, the Defendant-Appellee's counsel throughout this lawsuit, did not draft an affidavit or declaration or ask a question at Smith's deposition in order to controvert Smith's discriminatory statement that he sought favorable job consideration for promoting a female. (Baer, who is Smith's immediate supervisor, also did not submit an affidavit or a declaration or deposition testimony that Smith did not seek favorable job consideration from him in the self-appraisal portion of the performance review for promoting a female).[2]

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[2] As in most government agencies, the Corps' supervisors use the employees personal write up of their yearly accomplishments, along with the supervisor's own evaluation, to determine the significance of that employee's yearly achievements and determine the specific amount of monetary performance award that employee should receive for individual objectives they accomplished and achievements they made during that year. (Higher graded employees, such as Smith and his immediate supervisor, Baer, can receive amounts from zero to well over ten

(Continued on following page)

B. The second key material element of evidence in this case involves the extensive amount of circumstantial evidence of pretext that Goodin provided which demonstrated decision makers reasons were pretextual.

The district court remarkably ruled that Smith's remarks were "supported by no other evidence." App. 19. Completely contrary to that statement, Goodin presented extensive and credible additional evidence that the decision makers, (Smith and his immediate supervisor, Baer), purposefully manipulated the selection process and misled panel members in order to accomplish their objective to hire a female candidate. The sequence of events and evidence of pretext are briefly outlined below:

(1.) When the QA position was first advertised in June 2004, Smith and Baer testified they were following the full requirements of the Corps' Corporate Employment Regulation, ER 690-1-1203; that included psychometric "Gallup" assessment of candidates leadership abilities. (Later deviations from this ER, show Smith and Baer pretext).

(2.) 27 applicants timely applied, including Goodin and several others which Baer testified were qualified "some resumes that did meet that criteria, yes sir." Baer also testified

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thousand dollars for "successful" end of year performance awards).

he would have been satisfied with Mr. Goodin for the position "based just on the resumes."

(3.) QA Position description asking for "broad engineering design and construction quality assurance" experience matched Goodin's experience and most closely matched the relevant requirements of the position; especially considering the billions of dollars projected in the immediate and future military workload mission.

(4.) Baer's secretary informed Goodin August 2004, that selection process would be moving into final stages and he would be taking "Gallup" survey.

(5.) Discrimination/manipulation process began in order to achieve female candidate preselection.

  a. Position advertisement was cancelled in September 2004, with Baer saying it was "to get broader range of candidates", but mostly a "contrived" difference was made to the announcement title; QA coordinator versus QA manager, the elimination of the requirement for "broad engineering design and construction QA" experience as well as the odd emphasis for "planning."

  b. Position advertisement was retailored to "coincidentally" fit female candidate's experience; with equally odd minor changes (which disadvantaged Goodin and others) and added "planning" experience (a small subset discipline within civil engineering, which substantially advantaged female candidate with majority of "planning" work experience). App. 35.

c. Retailored job advertisement did not match needs of position as it truly existed with need for "broad engineering design and construction" QA experience (especially since Military workload was known and projected to increase by Billions of dollars beginning 2006 through 2011).

d. Despite the existence of qualified applicants, the decision-makers, Smith and Baer, re-posted the retailored QA position on October 2004 along with deviations from requirements of Corps' Employment Regulation and elimination of "Gallup" leadership assessment, which disadvantaged Goodin's strong leadership abilities and advantaged female candidate who testified she did not want to manage people, – (therefore her leadership score would be low).

e. Male candidate, Truelove, in original list of 27 candidates did not resubmit; approached Goodin with likelihood that position was being manipulated to get female candidate in the position.

f. Goodin and only a few others of original 27 candidates chose to re-apply.

g. Despite Baer's supposed reason for readvertising position to broaden the list of candidates; only 14 candidates applied, versus 27 candidates from first advertisement.

h. Female with "planning" experience was one of only several new candidates added to list.

i. Decision makers retailored make up of selection panel, by replacing two members with dominant "planning" backgrounds that had also worked in "planning" with female candidate. App. 64.

j. Smith and Baer deviated from Corps of Engineers hiring regulation policy in order to eliminate "independent" recommendation and input from "Gallup" survey and Division Commander.

k. Goodin expressed his skepticism of the selection process to Baer and Smith; but concerns were ignored.

(6.) Smith led panel to select female candidate, primarily based on interview results, which was another deviation from corporate employment regulation. App. 65-66.

(7.) Within three weeks following Goodin's filing of discrimination complaint, regarding unauthorized deviations from employment regulation; the employer wrote and approved an addendum which changed the very same selection issue which Goodin had identified as another one of Smith and Baer's unauthorized deviations from the corporate selection regulation/policy.

(8.) During discovery, employers' testimony regarding reasons for sudden change in employment regulation, directly conflicted between employer's own witnesses/Division Commander and Human Resources, HR person.

(9.) Selected female is given much of military work that Goodin had been performing, and she asks and seeks Goodin's review of her work.

(10.) Incompetence of selected female once getting into the QA position; Goodin presented documents and major business decisions where he corrected her work.

(11.) Baer assigns selected QA female candidate as manager over military work which Goodin had very successfully been performing for 17 years. App. 54.

(12.) Goodin attorney filed approximately 46 page retaliation complaint which was promptly refused by court, because of the "undue prejudice to Defendant." App. 25.

The court's essential arguments against most each and every bit of the pretext evidence above, regarding the employer's strangely coincidental timing and extensive manipulation of the selection process can basically be summed up in one example; where the court explained they are "simply another way of stating Mr. Goodin's disagreement with Defendant's decision . . . " App. 23.

Rather, the list of extensive individual acts of manipulation and their overall significance establish a genuine issue as to pretext. Although he was more qualified, Goodin does not rely upon his opinion that he was better qualified for the position, nor does Goodin request that a federal court act as a " . . . super-personnel department that second-guesses employers' business judgments." *Lee*, 226 F.3d at 1253-1254. The law is well-established that proof of pretext requires more than the employee's or even the court's opinion as to which candidate is better qualified for the promotion. *Lee*, 226 F.3d at 1253-1254. Rather, and in summary of above detailed list, Goodin presented evidence of the decision makers own testimony where they believed they were supposed to be following the Corps' corporate hiring regulation, ER 690-1-1203, yet the decision makers purposefully deviated and manipulated the process to accomplish their objective to hire a female. The main elements of evidence consisted of (i) removing the initial job posting and re-posting the job with a description that favored the female candidate, (ii) removing members of the selection panel and replacing them with two individuals who had worked in the same field and knew the specific female candidate, (iii) misleading the selection panel members with Smith and Baer's own bias, (iv) changing the nature of the statement set forth in the job posting to emphasize an area that was not relevant to the actual written job description,

(v) deviating from Corps of Engineers hiring regulation policy in order to eliminate "independent" decision input from "Gallup" survey and Division Commander, (vi) violating the Corps' employment regulation governing selections such as placing Baer as the decision maker instead of the commander of SAD, (vii) and within a few days of Goodin's statement that he intended to file an EEO claim, the Corps' division office attempted to modify the Corps of Engineers hiring regulation, by issuing a memorandum and addendum at the local level "clarifying" and in effect changing the regulation.

It is the significant evidence shown here and through lower court briefs, this evidence, together with the decision maker's statement under oath that selecting a female for the job was an achievement for which he improperly sought favorable job consideration, that demonstrates the defendants employment decisions were unlawfully motivated by sex which creates a genuine issue of material fact for trial.

Even assuming that the District Court correctly held that the decision maker's statements were not direct evidence, the statements made by the decision maker were, at the very least, circumstantial evidence of gender bias which, together with credible evidence are sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were pretextual, which precluded summary judgment in favor of the defendants/appellee.

C. The third and last key material element of evidence in this case involves the context and overall corporate environment surrounding this promotion selection.

Smith's statements and conduct in seeking favorable job consideration for promoting a "female" become apparent in what one commentator has referred to as the consequences of the "relentless pursuit of a more diverse workforce" by federal agencies. The commentator observes how " . . . striving for diversity, admirable in the abstract, can go awry" when a person with hiring responsibility engages in a "quest for female candidates." Rudman, William N., *Government Executive.com*, October 6, 2004 (www.govexec.com/story_page.cfm?filepath=/dailyfed/1004/100604mm.htm); see also *Straughn v. Evans, Secretary, Dept. of Commerce*, 2004 EEOPUB LEXIS 2226 (April 21, 2004). The danger that discrimination may become institutionalized as a result of a relentless pursuit of diversity is not abstract, but a genuine cause for concern.

Over zealous methods drastically seeking to increase the selections and promotions of women and minorities began several years ago within the Corps of Engineers. A three-star, General Joseph Ballard who was then the Corps of Engineers Chief Executive Commanding Officer, made numerous discriminatory public policy statements at Corps' offices and Corps' "townhall meetings" across the nation and institutionalized a bias within the Corps, against "white males over 45." General Ballard was the Corps' Chief

Executive Commanding Officer from 1996-2000, and for the four years of his administration, at the Corps' national meetings and as well as at individual townhall meetings across the nation; Ballard conveyed his biased plans for the Corps' promotion and selection process.

In these video taped "townhall meetings" with numerous regional Corps offices, (which are transcribed and included in the record of this case), General Ballard explained what he wanted and the promotion changes that were to be made " . . . 85 percent of the 14's and 15's in the Corps of Engineers was (sic) white male (sic) over 45 years old . . . Now, maybe that doesn't concern you, but worries the hell out of me . . . Okay? My question is where are the white females? Where are the females, period?" . . . . . . "I've told Division commanders I'm going to take a look at your programs, your people programs, and I want to make sure you're not self-perpetuating . . ." continued . . . "There's a couple of things I did that's going to drive the change. Number one, there's a couple of things I can do, I can change the processes, I can change the regulations, I can change the systems. . . . And I plan those things. So now you can't resist it . . . 'Okay. . . ' Because the system and the processes are driving it."

Acting with this bias and the authority of his Commanding General Officer and Chief Executive Officer position over the entire Corps of Engineers, over his entire four year administration from 1996-2000, General Ballard championed and had the Corps adopt his version of an over zealous diversity plan which he called his "people programs." Many white males viewed Ballard's town hall speeches as illegally targeting "white males over 45" because it was a general employment policy that disfavored "white males over 45" and it would unfairly and negatively impact their chances for future hiring and promotion selections. Ballard adamantly stopped any disagreement with his policies and Ballard's town hall "policy" meetings were viewed as part of the corporate culture change expected in the Corps and the Corps' official interpretation of what and how Ballard's "people program" was to be implemented and institutionalized within the Corps' normal business policies, procedures and processes.

The Chief Executive Commanding General Officer taking command of the Corps of Engineers after Ballard, fully embraced Ballard's "People Programs." None of General Ballard's biased speech or general employment policy disfavoring the "white males over 45" group has ever been rescinded or even corrected across the Corps. In the Corps, as in many government institutions, once a policy makes it through the system, becomes officially adopted and is used for years, its institutionalized impact remains; as it has in this case.

Note: Although this serious discriminatory issue of the Corps of Engineers having a corporate environment with an institutionalized and biased policy disfavoring "white males" was presented to the lower courts (as largely stated

above); it was completely ignored, and never addressed anywhere in lower courts. (Goodin is aware, and is not asking this Court to address these type errors and omissions which occurred in lower courts; these comments are only included here as descriptive narrative in this "statement of case.")

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REASONS FOR GRANTING THE WRIT

I. There Is Confusion and A Continuing Conflict Among the Circuit Courts Regarding the Standard for When, or Indeed Whether, Evidence Can Be Utilized To Prove Discrimination in Employment

There are numerous articles and published studies addressing this subject. In order to move beyond just the theoretical or opinions of "experts," the findings and quotes referenced here are based on a long term study of U.S. court cases. The methodology of the study was not just based on a sampling of data, but used information from the Administrative Office of the United States Courts for every district court and appellate case from fiscal 1979-2007; compare category #442: "Civil Rights: Jobs" with the wealth of data covering all sorts of cases. An earlier related study was published in 2004, and currently this latest 2008 updated study and article has been published and is entitled "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?", written by Kevin M. Clermont & Stewart J. Schwab.

It is published in the Harvard Law & Policy REVIEW, (Winter 2009, Volume 3, Number 1).

The American Constitution Society for Law and Policy, in Washington, DC hosted a distinguished panel discussion on the article with data and below highlights posted to their website titled, "New Data Unveiled: How the Federal Courts Are Treating Employment Discrimination Plaintiffs" http://www.acslaw.org/node/7384.

From their extensive data analysis, the authors, Stewart J. Schwab, dean of the Cornell Law School, and Kevin M. Clermont, law professor at the Cornell Law School, found that, in federal court employment discrimination cases:

1. They have "unearthed an anti-plaintiff effect that is troublesome" in the federal courts.
2. "The federal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts."
3. Reviewing the "drop in the number of cases, circuit-by-circuit, reveals that since the peak of 1998, after which the current drop in employment discrimination cases started, the steepest decline in case terminations comes in the Eleventh Circuit, with the Fifth, Fourth, Eighth, and Sixth Circuits following. Those circuits correspond well with those a plaintiffs' lawyer previously described as circuits perceived by the bar to be the most hostile to employment discrimination plaintiffs."

4. "As a result of the likelihood of unfavorable rulings in employment discrimination cases, more employees are declining to bring actions in federal court. Over seven years, 1999-2007, there has been a drop of 37 percent in the number of cases brought by plaintiffs."

5. Employment cases fare much worse than other types of cases that are filed. "Between 1979 and 2006, the win rate for plaintiffs in job discrimination cases in the federal court system was 15 percent, in contrast to 51 percent for non-jobs related cases."

6. "Employment discrimination plaintiffs are not likely to experience any greater success at the appeals court level. Data reveal that plaintiffs who lose at trial achieve reversals in less than nine percent of their cases. In contrast, defendants who lose at the trial court level are granted reversals in 41 percent of their cases."

7. "One can easily see that these plaintiffs do not do well in the district courts, although it is difficult to say exactly why. One can somewhat more solidly conclude that judicial attitudes are at play. The anti-plaintiff effect on appeal raises the specter that federal appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees' victories below while gazing benignly at employers' victories."

8. The conclusions of the analytical data and highlighted findings above, speaks for itself. But, based on those conclusions and findings,

other related concerns and inferences could possibly be drawn or at least reasonably assumed, such as;

A. Concern as to whether *Reeves v. Sanderson* is being correctly applied. (The courts' anti-plaintiff attitude and likelihood of unfavorable rulings in employment discrimination cases and the 1999-2007 drop of 37 percent in the number of cases brought by plaintiffs, is completely contrary to the anticipated outcome of *Reeves v. Sanderson Plumbing Products, Inc.*, in which this court issued a unanimous ruling that lowered the evidentiary burden on plaintiffs in employment discrimination cases. The Court concluded that employees could win such lawsuits without direct proof that their employers acted with discriminatory intent. As a result, more plaintiffs alleging employment discrimination were expected to survive summary judgment motions).

B. By "gazing benignly at employer victories", the circuit court allows other errors in lower court orders to more often go unchallenged. Example Note: Although the serious discrimination issue of the Corps of Engineers having an institutionalized corporate environment with past publicly stated policy disfavoring "white males over 45" in promotions, was presented to the lower courts, (as largely outlined earlier in the "Statement of Case"), and it was completely ignored, and never addressed anywhere by lower courts).[3]

C. With excessive summary judgments against plaintiffs, it is likely that courts are incorrectly applying *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) "In considering a motion for summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."

D. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110 (2000) (citation omitted). But, with the excessive quantity of summary judgments occurring against plaintiffs, it is likely this *Reeves v. Sanderson* standard is not being followed.

E. Plaintiffs are being denied their day in court, with many unable to afford high costs for "anti-plaintiff" appeals.

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[3] (Please note; Goodin is aware, and is not asking this Court to address these type errors and omissions that occurred in lower courts. This lower court error of not addressing plaintiff's evidence regarding Corps of Engineers institutionalized corporate policy disfavoring "white males" was only included as example of errors that can occur when "benignly" reviewed.)

F. It is possible to conclude that there is confusion and a continuing conflict among the circuit courts regarding the standard for when, or indeed whether, evidence can be utilized to prove discrimination in employment.

II. There Is Confusion and A Continuing Conflict Among the U.S. Supreme Court and the Eleventh Circuit Court; Regarding the Standard for When, or Indeed Whether, Evidence Can Be Utilized To Prove Discrimination in Employment

Over the years, the Eleventh Circuit Court has probably affirmed and/or reversed and remanded thousands of discrimination cases quoting various definitions of "direct evidence." Many of these definitions for direct evidence were consolidated in the record of *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189-90 (11th Cir. 1997) with a paragraph where several broad sentences each attempt to define and state what "Direct evidence is." That same *Merritt v. Dillard* document provides a listing of case examples where the circuit court has concluded that remarks and actions constitute direct evidence of illegal discrimination. The circuit court also references an additional direct evidence stipulation or "modifier" that states, "[O]only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, . . . constitute direct evidence of discrimination." *Earley v. Champion Int'l Corp.*, 907

F.2d 1077, 1080 (11th Cir. 1990), 512 F.3d 1296 (11th Cir. 2008).[4]

Being large and combined from numerous cases over decades, it is not surprising that a guiding standard and the words that define how that standard is to actually be interpreted and applied, sometimes need further refinements. See *Ash v. Tyson Foods, Inc.*, 129 Fed. Appx. 529 (11th Cir. 2005), *vacated*, 126 S. Ct. 1195 (2006), where this court ordered that the use of the "jump off the page and slap you in the face" standard was "unhelpful and imprecise as an elaboration of the standard" and recommended a more definitive (and realistic) standard. The court also directed that the single word "boy" did not need modifiers and was "not always benign."

Contrary to what could be interpreted as this court's direction and recommendation for more precision in the circuit courts elaboration of standards, and in general, directing more realistic precision in determining and inferring pretext; the circuit court continues to have controlling and guiding language in its definition of direct evidence that is stringently "unhelpful and imprecise as an elaboration of that standard." The portion of the district and circuit court's definition of direct evidence in question is, "[O]only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, . . . constitute direct evidence of discrimination." See *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990), where the direct evidence example given was a management memo saying "Fire Earley – he is too old.") App. 11-19.

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[4] *Earley v. Champion International Corp.* discussed in this petition, concern claims brought under the Age Discrimination in Employment Act ("ADEA"). In the Eleventh Circuit, legal standards developed in Title VII and ADEA cases are generally applied interchangeably. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001).

In *Ash v. Tyson Foods*, the circuit courts "jump off the page and slap you in the face" standard required evidence that was so blatant that it had to leap off the page, supposedly slapping and insulting the person of the court before they could or would recognize it as evidence. Although this "blatant" type "jump off the page" standard was partially stopped, it appears to be living on in the circuit court's mindset, and definition of direct evidence, where "[O]only the most blatant remarks," constitute direct evidence of discrimination.

Merriam-Webster's Dictionary, Eleventh Edition, copyright 2006 gives the meaning of "blatant" as "1: noisy especially in a vulgar or offensive manner: CLAMOROUS" and "2: completely obvious, conspicuous or obtrusive especially in a crass or offensive manner: BRAZEN (~disregard for the rules)" In other words, the circuit court's "only the most blatant" standard requires the discriminatory remarks in this case, and similarly in *Ash v. Tyson*, to be "noisy" "vulgar or offensive," and using secondary meaning to be "completely obvious, conspicuous especially in a crass or offensive manner"; otherwise the circuit court will not recognize it as direct evidence.

Smith's remarks are not "loud" or "vulgar," they were not given in an "offensive manner" nor given "in a crass manner," but they are even more revealing of his decisions and thoughts with the resulting actions just as unfair and damaging. Within the controlled corporate environment, Smith quietly wrote in his end of year performance evaluation of his achievement and, under oath, calmly admitted his state of mind and discriminatory motivation (gender) for the promotion selection, but these quiet and calm revelations are still just as clear and illegal as any "blatant" remarks.

Particularly troubling in this case and others, is the current standard's very stringent and unrealistic requirements that plaintiff's direct evidence be "only the most 'blatant'" or in other words "only the most 'loud'" or "only the most 'vulgar'" or "only the most 'obvious'" nature or "only" in a "crass manner" before the court will even acknowledge it as evidence of discrimination; almost of any kind, direct or circumstantial.

Below are some very similar discrimination case examples and the circuit court's rulings, which were based on their current standard and definition of "Direct Evidence." In addition to this *Goodin* case, two other recent cases, with discriminatory remarks and significant circumstantial evidence (*Ash v. Tyson*

Foods and *Van Voorhis v. Hillsborough*, 512 F.3d 1296 (11th Cir. 2008), have been heard by the Eleventh Circuit Court. All three cases have also hinged on the court's conclusions regarding whether discriminatory remarks made by a decision maker met the "only the most blatant" definition before allowing or disallowing the remarks as direct evidence.

Once the district court ruled the comments were not direct evidence because they did not meet that stringent "blatant" standard, it was extremely easy for the lower courts to then rule that the comments were not even circumstantial evidence. App. 71. With due respect to the lower court, the discriminatory comments of the decision maker, Smith, are plain and obvious sworn statements that require no inference nor additional step of interpretation because they very clearly admit a discriminatory motivation, (gender) for the specific employment promotion selection in this case; which is far more indicative of direct evidence than the decision maker's single verbal statement made in *Van Voorhis, supra*.

In the very similar *Van Voorhis v. Hillsborough County Board of Commissioners* case which also hinged on the circuit court's ruling of the decision makers discriminatory comment, the circuit court cited a slightly different, but significantly more favorable, portion of their definition of direct evidence to find in favor of the plaintiff and remanded the case back to the federal court. Their more favorable quoted definition, "We define direct evidence of discrimination as 'evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee. . . , '" should just as easily have been applied to this case or the *Ash v. Tyson* "boy" case.

Ironically the decision maker's comment in *Van Voorhis v. Hillsborough* was more general in nature than those in the *Goodin* or *Ash v. Tyson Foods* case. In *Van Voorhis*, the mosquito control helicopter pilot selection was made by an "independent" selection panel, and apart from the panel, the decision maker made a "lone" verbal statement that he did not want older pilots for the job. This statement could just as easily be subject to inference and interpretation as to what the decision maker considered "older" for the position. By old, he could have been referring to individuals in their 70's or in their 50's or he could have thought the critical physical demands of a helicopter pilot flying and spraying low over a densely populated city, needed to be like that of a professional athlete, and could be old for the position after age 40. The circuit court nonetheless concluded that, as a matter of law, a comment by a decision maker that he did not want "older pilots" in the position, if made, to be direct evidence. Whereas, in the instant case, the statement made under oath that hiring a female for the position at issue was a job accomplishment and "achievement" deserving of a good performance appraisal or award, leaves no doubt that gender was the basis on which the selection was made. Smith volunteered that he sought favorable job consideration for hiring a female and included it in the written self-appraisal portion of his performance review. Smith, and his immediate supervisor, Baer, never denied it, not in a declaration, not in an affidavit, nor in deposition testimony. There is no doubt that the "achievement" to which Smith was referring was the hiring of a female for the specific position at issue. Unlike the statement by the decision maker that he did not want "older pilots," Smith's statement clearly indicates gender bias because no inference is required to understand what Smith meant.

It is hardly surprising that senior Corps officials, including the EEO and Personnel directors, strongly indicated that it was improper for a Corps employee to seek favorable job consideration for promoting someone of a particular gender – just as it would have been improper for Smith to seek favorable job consideration for the "accomplishment" of promoting a white person, or a man, or a Christian, or a person whose national origin is Scotland or Ireland.

Smith's statements and conduct as well as the context of the corporate environment (disfavoring "white males") in which it was made; provide stronger direct evidence than in *Van Voorhis*, and it is far more dangerous than the behavior in *Van Voorhis*. In *Van Voorhis*, there was evidence in the record which indicated that the reason the decision maker wanted a younger person was personal because he wanted the job for his girlfriend. Whatever the moral implications of such a hiring practice, it did not reflect a corporate-wide mentality under which the decision maker was seeking a favorable performance review for discriminating on the basis of sex. The very idea that a senior Corps official would seek favorable job consideration based upon the "accomplishment" of promoting someone based upon their sex is a dangerous precedent to set.

Goodin respectfully contends that federal agencies should understand that there is a significant difference between considering diversity versus selecting someone because of their sex, race, national origin, religion. Rudman, William N., *Government Executive.com*, October 6, 2004 (www.govexec.com/story_page.cfm?filepath=/dailyfed/1004/100604mm.htm); (" . . . striving for diversity, admirable in the abstract, can go awry" when a person with hiring responsibility engages in a "quest for female candidates," see also *Straughn v. Evans, Secretary, Dept. of Commerce*, 2004 EEOPUB LEXIS 2226 (April 21, 2004)

In this case, similar to *Ash v. Tyson*, it is respectfully submitted that a decision maker's single statement that is not "blatant" can still be sufficient evidence of bias to be considered "direct evidence." Goodin also respectfully submits that the lower courts standard, that "only" allowing "the most blatant," loud or vulgar verbal or written "remarks" to be considered direct evidence of a decision maker's remarks is just as unreasonable a standard as the "jump off the page and slap you in the face" standard and just as "unhelpful and imprecise as an elaboration of the standard." "[O]only" recognizing "the most blatant" discriminatory remarks is inadequate to capture other types of "direct" verbal and written discrimination that occur within our society's work environments. Even though they might not be blatant, loud, vulgar or crass, Smith's discriminatory remarks are just as "direct." Their resulting actions are directly felt and are just as real and just as significant in economic terms.

◆

CONCLUSION

For the above reasons, Petitioner requests a writ of certiorari be issued to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Very Respectfully submitted,

STEPHEN F. GOODIN
1130 Midland Way
Lawrenceville, Georgia 30043

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10684
Non-Argument Calendar

D. C. Docket No. 06-00646-CV-BBM-1

STEPHEN F. GOODIN,

Plaintiff-Appellant,

versus

SECRETARY OF DEFENSE,

Defendant,

FRANCIS J. HARVEY,
Secretary of the Army,
in his official capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 21, 2008)

Before BIRCH, PRYOR and KRAVITCH, Circuit Judges.

PER CURIAM:

Stephen Goodin appeals the district court's grant of summary judgment in his gender discrimination action, brought pursuant to Title VII, 42 U.S.C. § 2000e-2(a).

Goodin filed the instant action alleging gender discrimination after the Army promoted Susan Vohlken into a position Goodin sought. Goodin asserted that he was better qualified and that various errors in the selection process established the discriminatory intent. The Army moved for summary judgment, explaining that it had not promoted Goodin because Vohlken had broader experience, a master's degree, and performed better in the interview. Goodin responded that these reasons were pretextual, as evidenced by various improprieties in the selection process. He further alleged that he had direct evidence of discrimination based on a statement by Christopher Smith, a member of the selection process.

Upon the magistrate judge's recommendation, and over Goodin's objections, the district court granted summary judgment. The district court concluded that Goodin could not show pretext simply by disagreeing with the employer's decision, and that he had not shown his qualifications were significantly better such that a reasonable person would not have chosen Vohlken over Goodin. The court also rejected Smith's statement as direct evidence of discrimination and found that this isolated comment would not show pretext because it offered no evidence of discriminatory motive. The court further rejected Goodin's claims of errors in the selection process, noting that Goodin's conclusory statements and conspiracy theory were insufficient because they were unsupported by evidence. The court also addressed each of Goodin's objections to the magistrate judge's recommendation, finding that the policy concerning the selection process did not apply to the position at issue, and even if there were irregularities in the selection process, there was no evidence of discriminatory motive.

We review a district court's grant of summary judgment *de novo,* viewing the evidence in the light most favorable to the party opposing the motion. *Skrtich v. Thornton,* 280 F.3d 1295, 1299 (11th Cir. 2002). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Eberhardt v. Waters,* 901 F.2d 1578, 1580 (11th Cir. 1990).

Title VII prohibits discrimination on the basis of gender. 42 U.S.C. § 2000e-2(a). On any Title VII claim the plaintiff bears "the ultimate burden of proving discriminatory treatment by a preponderance of the evidence." *Earley v. Champion Int'l Corp.,* 907 F.2d

1077, 1081 (11th Cir. 1990). Goodin may satisfy his burden by presenting direct evidence of an intent to discriminate or circumstantial evidence using *McDonnell Douglas's* burden-shifting framework. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

If the plaintiff relies on circumstantial evidence using the burden-shifting framework in *McDonnell Douglas Corp.,* the plaintiff first must establish a prima facie case of discrimination, which creates a rebuttable presumption of discrimination. *See EEOC v. Joe's Stone Crabs, Inc.,* 296 F.3d 1265, 1272-73 (11th Cir. 2002). Once a plaintiff has made a prima facie showing of discrimination, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the employment action. *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 254-55, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981). If the defendant articulates a legitimate, non-discriminatory reason, the plaintiff must come forward with evidence sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were pretextual. *Holifield v. Reno,* 115 F.3d 1555, 1565 (11th Cir. 1997).

Goodin argues that summary judgment was improper because he proffered direct evidence of discrimination in the form of a statement by decision-maker Christopher Smith, and that he established that the Army's legitimate reason was a pretext for discrimination.

After a thorough review of the records, we affirm for the reasons given in the district court's order dated February 1, 2008.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEPHEN F. GOODIN,
Plaintiff,
v.
PETE GEREN,
Secretary of the Army,
Defendant.

CIVIL ACTION FILE
NO. 1:06-CV-0646-BBM
(Filed Feb. 1, 2008)

ORDER

This matter is before the court on Plaintiff Stephen F. Goodin's ("Mr. Goodin") objections to the Magistrate Judge's Report and Recommendation ("R&R") [Doc. No. 76]. In the R&R, the Magistrate Judge recommended that Defendant Pete Geren, Secretary of the Army's ("Defendant") Motion for Summary Judgment [Doc. No. 41] be granted.

I. Factual and Procedural Background

Mr. Goodin is a GS-0808-13 Division Architect with the United States Army Corps of Engineers ("the Corps") in the South Atlantic Division. On June 11, 2004, the Corps advertised the position of Quality Assurance Coordinator, a GS-14 level position. Mr. Goodin, along with approximately 26 others, applied for the position. At the closing of the application period, Gregory Baer, the Chief of the Business Technical Division, reviewed the resumes and noticed that most of the applicants had construction backgrounds. He believed that this result occurred because the term "quality assurance" is one normally associated with the construction field. As he was seeking applicants with more experience in the technical, engineering, and planning areas, Mr. Baer decided to cancel the job advertisement and reissue it. The second job posting was for the position of Technical Quality Manager, also a GS-14 level.

Mr. Goodin applied for the position of Technical Quality Manager. Susan Vohlken also applied for the job, though she had not applied to be the Quality Assurance Coordinator because of its focus on construction. There were 14 applicants in total for the second job listing. Ms. Vohlken has experience in the planning, regulatory, construction, and engineering fields. She also has a master's degree in Public Administration. Mr. Goodin, by contrast, has experience primarily in the area of construction, and only has a bachelor's degree. Both Mr. Goodin and Ms. Vohlken had worked for the Corps since the early 1980s.

Mr. Baer served as the selecting official for the position, and assembled a panel to evaluate the candidates. The panel members were Christopher Smith, Lyn Richardson, Curtis Flakes, Sharon Bond, and Gerald Melton. On November 16, 2004, Mr. Baer forwarded copies of the recruitment announcement, job description, selection criteria, the applicants' resumes, and a matrix of the candidates to each member of the panel. Each panel member independently ranked the applicants. Mr. Baer aggregated the results. Mr. Baer personally ranked Ms. Vohlken first and Mr. Goodin second, followed by the other candidates. The aggregate results placed Ms. Vohlken as the leading candidate, with 11 points, followed by Mr. Goodin with 16 points, and Randy Sitton with 20 points.[1] On the basis of the rankings, the panel decided to interview the top four candidates.[2]

The interviews took place on January 21, 2005. Mr. Baer was initially going to participate, but a family emergency required him to be elsewhere that day. Barbara Ray and Walden Parker served as observers to ensure that the questions were asked in similar fashion in each session, and that the candidates were treated fairly. The interviews proceeded, with each applicant asked the same questions. After the interviews, Ms. Vohlken was ranked first by all panel members. Her interview was described as "very good and broad," and the panel was "impressed." (Def.'s Ex. 7 [Doc. 41-5, p. 33].) Mr. Goodin, by contrast, "did not sell himself to the panel or convey passion for the position." He was "'low energy,' made poor eye contact and did not address the questions very well." Overall, his interview was "very quick and shallow." (*Id.*) Three out of five panel members ranked Mr. Goodin last among the three interviewees. The panel was similarly unimpressed by Mr. Sitton, mainly because he was "basically one dimensional in his responses, focusing on construction." (*Id.*)

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[1] The panel members gave one point for their first place choice, two points for their second place choice, and so on. The points were totaled for each candidate, with a lower numerical score indicating a higher ranking.

[2] The panel ultimately interviewed only three candidates: Ms. Vohlken, Mr. Goodin, and Mr. Sitton. The fourth accepted another job and withdrew his application.

The panel unanimously recommended that Ms. Vohlken be offered the job. Due to concerns about the ability of either Mr. Goodin or Mr. Sitton to handle the requirements of the position, the panel further recommended that there be no second choice. If Ms. Vohlken declined the offer, the panel advised that the posting be re-issued. Mr. Baer returned to work later that day and Mr. Smith relayed the panel's recommendation to him. Ms. Vohlken was offered the position on January 24 and accepted it.

On April 29, 2005, Mr. Goodin filed a formal complaint of discrimination with the Equal Employment Opportunity Commission ("EEOC"). His suit was dismissed by the EEOC administrative judge on April 21, 2006, because he had filed a complaint in this court. Mr. Goodin sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq, alleging that he was discriminated against on the basis of his gender (male) when he was not selected for the position of Technical Quality Manager. The R&R recommended that the court grant summary judgment to Defendant. Mr. Goodin has filed timely objections to the R&R, so the court will review the Magistrate Judge's disposition de novo. *See* Fed. R. Civ. P. 72(b)(3).

II. Standard of Review

Summary judgment is proper if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the non-movant must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient. . . ." *Anderson*, 477 U.S. at 252. The non-movant may not avoid summary judgment with evidence that is "merely colorable or is not significantly probative." *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997). Indeed, the non-movant must go beyond the pleadings and set forth specific facts to show that a genuine issue for trial does exist. *Anderson*, 477 U.S. at 257.

III. Analysis

The court will first analyze Mr. Goodin's discrimination claim, and then address each of his four objections individually.

A. Discrimination under Title VII

In an employment discrimination case, evidence of discrimination may be proved through either direct or circumstantial evidence. *Equal Employment Opportunity Comm'n v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002). Direct evidence "is evidence, that, if believed, proves the existence of a fact in issue without inference or presumption." *Id.* (citations and internal quotations omitted). Though Mr. Goodin occasionally suggests that he has identified direct evidence, the court disagrees. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) ("One example of direct evidence would be a management memorandum saying, 'Fire Earley – he is too old.'").[3] Mr. Goodin has presented no evidence that would itself, without inference or presumption, demonstrate the existence of discrimination. Therefore, his claim will be analyzed under the burden-shifting approach set forth in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973).

Under *McDonnell-Douglas,* the plaintiff begins by establishing a prima facie case of discrimination. *Earley,* 907 F.2d at 1081. A prima facie case for failure to promote, which Mr. Goodin has alleged here, is satisfied when the plaintiff demonstrates that: "(i) she belonged to a protected class; (ii) she was qualified for and applied for a position; (iii) despite qualifications, she was rejected; and (iv) the position was filled with an individual outside the protected class." *Springer v. Convergys Customer Mgmt. Group Inc.,* 509 F.3d 1344, 1347 n.2 (11th Cir. 2007).

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[3] *Earley v. Champion International Corp.* and various other cases discussed in this Order concern claims brought under the Age Discrimination in Employment Act ("ADEA"). In the Eleventh Circuit, legal standards developed in Title VII and ADEA cases are generally applied interchangeably. *Pennington v. City of Huntsville,* 261 F.3d 1262, 1269 (11th Cir. 2001).

After the plaintiff establishes the prima facie case, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas,* 411 U.S. at 802. If the defendant successfully rebuts the plaintiff's prima facie case with a legitimate, nondiscriminatory reason for the termination, the plaintiff must present evidence that the defendant's proffered reason was a pretext. *Id.* at 804. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the plaintiff." *Joe's Stone Crabs,* 296 F.3d at 1273.

Mr. Goodin has satisfied the elements of his prima facie case. He is a member of a class protected under Title VII, was qualified and applied for the position in question, and was rejected. The position was filled by a woman. Defendant must therefore come forward with a legitimate, nondiscriminatory reason for hiring Ms. Vohlken over Mr. Goodin. The defendant's burden of rebutting the prima facie case is "exceedingly light." *Cooper v. Southern Co.,* 390 F.3d 695, 725 (11th Cir. 2004) (citation and internal quotations omitted). "At this stage of the inquiry, the defendant need not persuade the court that its proffered reasons are legitimate; the defendant's burden is merely one of production, not proof." *Id.* (citation and internal quotations omitted).

Defendant's explanation for selecting Ms. Volhken is that the selection panel believed her to be the most qualified for the position by virtue of her training, experience, and superior performance in the interviews. Defendant has produced ample evidence in support of this legitimate, nondiscriminatory reason for hiring Ms. Vohlken. When the candidates were initially ranked on the basis of their resumes and written applications, Ms. Vohlken placed first on the aggregate ranking among the panel members. After the interviews, she was the unanimous choice for the position. The panel members detailed in writing why Ms. Vohlken was the best candidate, and why Mr. Goodin's interview was unimpressive. In fact, Mr. Smith testified that both Mr. Goodin and Mr. Sitton "left the panel with the impression that they could not perform the duties of [the] position." (Dep. of Christopher T. Smith, 101:25-102:1, Jan. 17, 2007.)

Because Defendant has satisfied its burden of production under the *McDonnell Douglas* test, the burden shifts again to Mr. Goodin to demonstrate that the reason offered by Defendant was pretextual. A court "do[es] not sit in judgment of the wisdom of an employer's selection." *Cooper,* 390 F.3d at 732. A finding of pretext requires more than the plaintiff's disagreement with the employer's business decisions.

See Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991). For example, pretext means more than simply showing that the plaintiff was better-qualified than the employee ultimately hired. Rather, there must be a disparity in qualifications "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." *Cooper*, 390 F.3d at 732 (citations and internal quotations omitted). Pretext requires a showing "'*both* that the reason was false, *and* that discrimination was the real reason.'" *Brooks v. County Comm'n of Jefferson County*, 446 F.3d 1160, 1163 (11th Cir. 2006) (*quoting St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)).

In the first place, Mr. Goodin cannot create a genuine issue of fact that his employer's reason for not promoting him was false. He cannot show that his qualifications were so significantly better than Ms. Vohlken's that no reasonable person would have hired her over him. Mr. Goodin's contention is essentially that the position was heavily focused on military construction, an area in which he is allegedly better credentialed than Ms. Vohlken. Mr. Goodin repeats numerous times the fact that the Corps was undertaking the largest military construction since World War II, evidence, in his opinion, that the open position should have been filled by someone with strong construction experience. The fact that Mr. Goodin disagreed with his employer over what the important job elements were does not create a genuine issue of material fact. Mr. Goodin may indeed have had much stronger construction experience than Ms. Vohlken, but that was not the area of expertise Defendant chose to focus on in advertising the position. Asking the court to find pretext on this basis is exactly the sort of second-guessing of business decisions that courts are not to engage in.

Mr. Goodin also argues that the initial posting of the job description, followed by its removal and then re-posting under a new title is evidence of pretext. According to Mr. Goodin, the new posting contained very few changes and those changes happened to coincide with Ms. Vohlken's areas of strength. However, this theory of a conspiracy is simply not supported by evidence in this case. Mr. Baer detailed the reasons behind the withdrawal and re-posting of the vacancy, namely, that the applications he received under the first posting had too much emphasis on construction and he wanted to attract a broader array of experience, including engineering and planning. He stated, "We knew what we wanted in the position. We just did not have it described properly and reaching the right audience. . . . " (Dep. of Greg Baer, 30:18-20, Aug. 17, 2006.) Once Mr. Baer identified the problem with the original job advertisement, he removed it, reissued it, and hired the most highly ranked candidate. Mr. Goodin's "evidence" of pretext is his unsupported theory that this was an elaborate ruse to ensure Ms. Vohlken's participation in the job search. It has long been a precept governing cases like this one that "[c]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination. . . ." *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir. 1996) (citations and quotations omitted).

Even assuming that Mr. Goodin could create a genuine issue of material fact as to whether Defendant's explanation for hiring Ms. Vohlken was false, which the court firmly believes he cannot, Mr. Goodin would also need to show that the real reason behind the employment action was discrimination. *Brooks*, 446 F.3d at 1163. The only evidence that Mr. Goodin has submitted to this end is a one-page excerpt from what the court assumes is the testimony of Christopher Smith.[4] The selected conversation is as follows:

> Mr. Goodin: So, when you filled out your end of the year performance accomplishments –
>
> Mr. Smith: I had to.

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[4] The court has serious concerns, shared by the Magistrate Judge, about what exactly this "evidence" is and whether it would be admissible at trial. Mr. Goodin asserts that the document is testimony from a proceeding before the EEOC administrative judge. Neither this court nor the Magistrate Judge has seen a full transcript of the EEOC proceeding, or anything else to indicate that the quoted exchange is sworn testimony. Nonetheless, because the court does not believe this alleged testimony, even if admissible, creates an issue of material fact, for purposes of this Order the court will accept it as accurate and construe it in favor of Mr. Goodin.

Mr. Goodin: – did you list Susie Vohlken as one of your accomplishments in that arena?

Mr. Smith: That I had participated on panels and, yes, I did hire a white female, correct.

Mr. Goodin: Don't you agree that that gives you points, positive points, that can contribute to your overall performance rating?

Mr. Smith: It was an achievement. So, yes, I guess it would be looked favorably upon.

(Pl.'s Ex. 23 [Doc. No. 56-4, p. 10].) Accepting that this document shows that Mr. Smith believed it to be a positive accomplishment to hire white females, as Mr. Goodin argues, the court does not believe it creates a genuine issue of material fact as to pretext. Mr. Smith's view that hiring Ms. Vohlken was an "accomplishment" does not demonstrate either that he did not also think she was the best candidate for the job, or that he was motivated by discrimination. This evidence does nothing to show that Defendant's explanation for hiring Ms. Vohlken is "unworthy of credence." *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 256 (1981).

Furthermore, this lone, isolated comment is insufficient to establish a circumstantial case for pretext. Evidence relating to discriminatory comments must be "'read in conjunction with the entire record'" and "'considered together with'" all other evidence in the record. *Rojas v. Florida,* 285 F.3d 1339, 1343 (11th Cir. 2002) (*quoting Ross v. Rhodes Furniture, Inc.,* 146 F.3d 1286, 1291-92 (11th Cir. 1998)). In *Rojas,* the employer made a comment to the effect that a female employee (not the plaintiff herself) did not deserve her job because she was a woman. Taken alone, that comment was insufficient to create a question of fact as to pretext, because it was isolated and because it was unrelated to the plaintiff's own employment. The court recognizes that Mr. Smith's comment was related to the employment decision not to promote Mr. Goodin. However, the court also notes that the comment in *Rojas* was explicitly discriminatory, whereas Mr. Smith's comment was not. Both comments were equally isolated and supported by no other record evidence of discrimination. The court therefore believes that this solitary piece of evidence, like the comment in *Rojas,* is insufficient to create a genuine issue of fact over whether Ms. Vohlken's hiring was due to discrimination.

In sum, the court agrees with the Magistrate Judge's comprehensive opinion and concludes that Mr. Goodin cannot survive summary judgment on the present record. However, in order to be thorough, the court will address Mr. Goodin's objections to the Magistrate Judge's recommendations individually.

B. Mr. Goodin's Objections to the R&R

1. The Magistrate Judge failed to credit direct evidence that the "pre-selection" was impermissibly based on gender

Mr. Goodin argues that it was error to disregard his "direct evidence" of discrimination, in the form of Mr. Smith's "accomplishment" comment discussed above. The court has already set forth the definition of direct evidence, and this comment does not meet the test. *See Earley,* 907 F.2d at 1081; *Scott v. Suncoast Beverage Sales, Ltd.,* 295 F.3d 1223, 1227-28 (11th Cir. 2002). A comment that hiring a female is an accomplishment is not direct evidence because it requires further inference. A jury would have to infer from Mr. Smith's statement that he discriminated against Mr. Goodin in order to achieve the accomplishment of hiring a woman. That additional step renders the evidence of the "accomplishment" comment circumstantial.

For the reasons discussed above, the court does not credit Mr. Goodin's objection that the Magistrate Judge disregarded the "accomplishment" comment evidence. A single, isolated comment, supported by no other evidence, is not sufficient to create a triable issue of fact as to whether there was discrimination.[5]

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[5] Most of Mr. Goodin's objection is devoted to arguing that Mr. Smith was in fact a decision-maker. The Magistrate Judge, by contrast, mentioned that Mr. Baer and not Mr. Smith was the decision-maker in one sentence. Whether Mr. Smith's role in the employment decision was that of "decision-maker" or not does

(Continued on following page)

There is "no additional evidence that is even marginally persuasive on the issue of pretext" in this case. *Scott,* 295 F.3d at 1230.

2. The Eleventh Circuit's decision in *Springer v. Convergys Customer Management Group Inc.* provided new authority for establishing pretext.

With this objection, Mr. Goodin essentially reiterates his reliance on Mr. Smith's "accomplishment" comment to carry his case past the summary judgment stage. Mr. Goodin correctly states that the *Springer* case stands for the proposition that preselection in violation of corporate policy alone does not necessarily indicate discriminatory intent. *Springer,* 509 F.3d at 1350. However, the only evidence to which Mr. Goodin can point as circumstantial evidence of discrimination to add to his assertion of pre-selection is, once again, Mr. Smith's comment. The court again concludes that the comment, even together with Mr. Goodin's conclusory assertions of pre-selection, is not enough.[6]

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not change the court's conclusion that no disputed issue of fact is created by his comment.

[6] Mr. Goodin contends in his objection that the Magistrate Judge "impermissibly assessed the witness's credibility, weighed the evidence surrounding the statement, and drew inferences in favor of the non-movant Defendant." (Pl.'s Objections to the Magistrate's R&R 10.) The Magistrate Judge's observations about this piece of evidence were that

(Continued on following page)

3. There was a genuine issue of material fact as to "pre-selection."

Mr. Goodin asserts that the Magistrate Judge erred in ruling that no genuine issue of fact existed as to whether Ms. Vohlken was the pre-selected candidate. First, Mr. Goodin argues that under the applicable Corps regulation for hiring, ER 690-1203-1, General Michael Walsh and not Mr. Baer should have been the selecting official. The Magistrate Judge found that the regulation applied only to the selection process of an employee at the level of GS-15 or "Supervisory GS-14 (or equivalent)" and was not relevant, as the position Mr. Goodin sought was a non-supervisory GS-14. Mr. Goodin has identified testimony in Mr. Smith's deposition that may be construed

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> [i]t is unclear from this exchange whether Smith, who was not the decision-maker, considered his 'achievement' to be his participation on the panels or the hiring of a female or both. And even if Smith's alleged statement is construed as an indication that he thought the hiring of a female was an achievement, the statement does not indicate that Smith considered Vohlken to be either less qualified than [Mr. Goodin] or undeserving of the position.

(R&R 36.) The Magistrate Judge wrote these sentences in support of the conclusion that the proffered evidence was insufficient to create a triable question of fact. The comment by Mr. Smith was not direct evidence of discriminatory intent, and even if construed as circumstantial evidence, the comment did not tend to prove the necessary elements of pretext: that Mr. Goodin was more qualified than Ms. Vohlken and was overlooked because of his sex. In any event, the court has conducted a de novo review and comes to that conclusion independently.

to indicate that he believed the policy laid out in ER 690-1203-1 applied. The court does not find that this creates a triable issue of fact. "No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers," the federal courts do not interfere so long as the employer has given an honest account of its behavior. *Elrod,* 939 F.2d at 1470 (citation and internal quotations omitted). Even accepting Mr. Goodin's argument that Mr. Baer was not the proper hiring official, he has presented no evidence to show that Mr. Baer believed the regulation applied such that he was not the proper selecting official, much less that any of his actions were motivated by discriminatory intent.

Mr. Goodin has also cobbled together various assertions that he believes create a disputed issue of fact as to whether Ms. Vohlken was pre-selected. In replacing the original job posting with the second advertisement, Mr. Goodin contends that Mr. Baer and Mr. Smith tailored the posting to match Ms. Vohlken's credentials, engaged in conduct inconsistent with their stated desire to broaden the applicant pool,[7] and de-emphasized military engineering and

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[7] By this, Mr. Goodin refers to the fact that the number of applicants who responded to the second job posting was only 14, as compared to the 27 applicants for the Quality Assurance Coordinator solicitation. The court does not find this result to be inconsistent with an attempt to "broaden" the pool. Though Defendant received fewer applicants, more of those applicants

(Continued on following page)

construction programs. Furthermore, they replaced panel members who had a military background with two members with civil planning experience. Mr. Baer served as the selecting official instead of General Walsh, who would have known that the job posting should have a more construction-oriented focus. Finally, Mr. Baer and Mr. Smith eliminated the use of a psychometric leadership test that would have, according to Mr. Goodin, disfavored Ms. Vohlken. (Pl.'s Objections to the Magistrate's R&R 15-16 & n.6.) Every one of these arguments is simply another way of stating Mr. Goodin's disagreement with Defendant's decision to advertise the position as a Technical Quality Manager, with emphasis on civil planning, rather than a Quality Assurance Coordinator, a more construction-focused job. Federal courts do not sit in judgment of a business's employment decisions. Mr. Goodin has still not demonstrated a triable issue of fact that Defendant's explanation for the two job postings was dishonest, or that Defendant was motivated by discrimination.

4. Other errors and additional evidence demonstrating pretext.

Mr. Goodin raises three additional arguments that he claims demonstrate pretext. The first relates again to the Corps regulation, ER 690-1203-1,

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had civil planning backgrounds, which was the type of experience Defendant sought with the second job listing.

governing hiring. Shortly after Mr. Goodin made known his intention to file a discrimination claim, Defendant issued a memo clarifying the regulation. The memo stated that the Division Commander is to serve as the selecting official for all GS-15 and supervisory GS-14 positions. Before, the language "(or equivalent)" modified "supervisory GS-14." Thus, as the court understands the argument, before the modification, a Division Commander was the proper person to select a new employee for either GS-15, supervisory GS-14, or the equivalent to supervisory GS-14. Now, a Division Commander is required only for a GS-15 or supervisory GS-14 hire. Mr. Goodin alleges that the modification was for the purpose of retroactively allowing Mr. Baer, who is not a Division Commander, to make the Technical Quality Manager selection. The necessary conclusion from this argument is that the Technical Quality Manager position was equivalent to a supervisory GS-14 position. Mr. Goodin has submitted no evidence to show the court what "or equivalent" means, or to demonstrate that the job he sought fell into that category. There is nothing that indicates that Mr. Baer or anyone else believed the position was equivalent to the supervisory GS-14 level. "Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules." *Nix v. WLCY Radio/Rahall Commc'ns,* 738 F.2d 1181, 1187 (11th Cir. 1984).

Even accepting that the Technical Quality Manager position was "equivalent" to a supervisory GS-14 level, and that Defendant revised its policies to retroactively permit Mr. Baer to select Ms. Vohlken, the court still finds that Mr. Goodin is well short of demonstrating pretext. Again, an employer's violation of its own policies alone does not indicate discrimination. *Springer*, 509 F.3d at 1350. A sudden change in those policies might indicate that Defendant's explanation, that the Technical Quality Manager was not the equivalent of a supervisory GS-14, is not worthy of credence. However, Mr. Goodin has still submitted no evidence to show that discrimination was behind Mr. Baer's participation in the selection process. Therefore, the court rejects this evidence as creating a genuine issue of fact.

Mr. Goodin devotes one paragraph to the allegation that Mr. Baer retaliated against him, and argues that this is evidence of pretext. The Magistrate Judge previously refused to allow Mr. Goodin to add a retaliation claim to his pleadings because of the undue prejudice to Defendant.[8] The court will not consider such allegations at this late date. The court sees no reference to a retaliation claim in Mr. Goodin's Complaint, and the record is otherwise utterly devoid of any evidence to support such a claim.

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[8] Without making any finding on the merits, the Magistrate Judge noted the "weaknesses in [the] presentation" of Mr. Goodin's retaliation claim. (Magistrate Judge's Order of July 20, 2007, at 8 [Doc. No. 52].)

Finally, Mr. Goodin claims that Mr. Baer misrepresented his relationship with Ms. Vohlken. The evidence in support of this is an email joke that Mr. Baer forwarded to Ms. Vohlken and another person, Robert Fulton. Mr. Goodin represents in his submission to the court that the email is "sex-related."[9] The email contains what is obviously a joke and, in the court's view, could in no way be construed as "sex-related."[10] It does not demonstrate pretext in any way.

IV. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment [Doc. No. 41] is GRANTED. This action has been adjudicated on the merits, and it is DISMISSED.

IT IS SO ORDERED, this 1st day of February, 2008.

s/ Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES
DISTRICT JUDGE

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[9] Mr. Goodin also represented to the court that there were "emails" in the plural, but has submitted only one for the court's review.

[10] The joke is entitled "Brokeback Ranch" and recounts the story of a gay rancher who wears womens' clothes.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

STEPHEN F. GOODIN, Plaintiff, v. PETE GEREN, Secretary of the Army, Defendant	:	Civil Action No. 1:06-CV-646-BBM (Filed Dec. 28, 2007)

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Attached is the Report and Recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C. § 636(b)(1) and this court's Local Civil Rule 72.1. Let the same be filed and a copy, with a copy of this order, be served upon counsel for the parties.

Each party may file written objections, if any, to the attached Report and Recommendation within ten (10) days after being served with a copy of it. 28 U.S.C. § 636(b)(1). Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District

Court. If no objections are filed, the Report and Recommendation may be adopted as the opinion and order of the District Court and any appeal of factual findings will be limited to a review for plain error or manifest injustice. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984).

The Clerk is **DIRECTED** to submit the Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

SO ORDERED this 28th day of December, 2007.

/s/ Susan S. Cole
SUSAN S. COLE
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEPHEN F. GOODIN, Plaintiff, v. PETE GEREN, Secretary of the Army, Defendant	:	Civil Action No. 1:06-CV-646-BBM (Filed Dec. 28, 2007)

FINAL REPORT AND RECOMMENDATION

This case is before the court on Defendant's Motion for Summary Judgment. [Doc. 41]. For the reasons set forth below, the undersigned **RECOMMENDS** that Defendant's motion be **GRANTED**.

I. Procedural History

At all times relevant to this lawsuit, Stephen F. Goodin ("Plaintiff" or "Goodin"), was employed by Defendant in the United States Army Corps of Engineers. (Complaint, ¶ 6). On March 21, 2006, Plaintiff filed a complaint against Defendant [Doc. 1], alleging that Defendant discriminated against him because of his sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, ("Title

VII").[1] Defendant filed his answer on May 25, 2006 [Doc. 4], and discovery proceeded.

Defendant has filed a motion for summary judgment with accompanying statement of undisputed material facts and exhibits. [Doc. 41]. Plaintiff filed a response to Defendant's motion for summary judgment, including a response to Defendant's statement of material facts, a statement of disputed material facts and supporting exhibits. [Doc. 53]. Defendant then filed a reply in support of his motion for summary judgment. [Doc. 68]. Plaintiff filed a "Motion for Oral Argument and Notice of Objection." [Doc. 69]. The court denied Plaintiff's motion for oral argument and gave Defendant an opportunity to file a response to Plaintiff's objections to Defendant's reply [*see* Doc. 71], and Defendant filed a response. [Doc. 72].

II. Facts

A. Standards for Determining Facts for Summary Judgment

The "facts," for summary judgment purposes only, are derived from the submissions of the parties, as set out in Defendant's "Statement of Material Facts as to Which There is No Genuine Issue to be Tried" [Doc. 41] ("Def. SMF"); Plaintiff's response to Defendant's statement of undisputed material facts [Doc. 53]; Plaintiff's "Statement of Material Facts as to Which There is a Genuine Issue for Trial" [Doc. 53] ("Pl. SMF"); Defendant's response to Plaintiff's statement of material facts [Doc. 68]; and the uncontroverted record evidence. The court has reviewed the citations provided by the parties to determine whether genuine issues of material fact exist to be tried. However, the court is not obligated to "scour the record" to determine whether such issues exist. *Tomasini v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 315 F.Supp.2d 1252, 1260 n.11 (S.D. Fla. 2004).[2] The facts are construed in the light most favorable to Plaintiff as the non-movant. *See Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1309 (11th Cir. 2001).

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[1] Plaintiff originally named Secretary of Defense Donald Rumsfeld in his official capacity as the defendant. (*See* Complaint, para. 4). By Order dated August 9, 2006, Francis J. Harvey, Secretary of the Army, was substituted in his official capacity as the defendant. [Doc. 17]. Pete Geren replaced Francis J. Harvey as Secretary of the Army on July 16, 2007 and is now substituted in his official capacity as the defendant. *See* Fed. R. Civ. P. 25(d).

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[2] The undersigned notes that with respect to several of Plaintiff's statements of material facts, either he failed to cite to record evidence to support his assertions, or the document cited is not in the record. (*See* Pl. SMF, ¶¶ 9, 15, 16, 21, 37, 52, 57, 59, 66, 69, 70, 72, 74, 75). Plaintiff's unsupported assertions are not sufficient to demonstrate the existence of a genuine issue of material fact. *See Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("This court has consistently held that conclusory allegations without specific supporting facts have no probative value") (citations omitted)).

B. Facts Relevant to Defendant's Motion for Summary Judgment[3]

Stephen F. Goodin ("Plaintiff") is employed as a GS-0808-13, Division Architect, with the United States Army Corps of Engineers, South Atlantic Division ("the Corps"). (Def. SMF, ¶ 1). On June 11, 2004, the Corps advertised the position of Quality Assurance Coordinator I, SCGT04970986, GS-14. (Def. SMF, ¶ 2; *see also* Pl. SMF, ¶ 7). After the application closing date for the position, the selecting official, Gregory Baer, who was Chief of Business Technical Division for the South Atlantic Division ("SAD"), received copies of approximately 25 or more resumes from the list of applicants, and he sent the resumes to members of a panel. (Def. SMF, ¶ 3; Baer depo., p. 24; Smith depo., pp. 30-31). No ranking of the candidates for the Quality Assurance Coordinator position was performed, however. (Baer depo., p. 78).

Baer testified that when he received the resumes, he noticed that most of the applicants had construction backgrounds, which "tied into the fact that [he] had advertised it as a Quality Assurance Coordinator." (Baer depo., pp. 24-25; *see also* Smith depo., pp. 30-31). Baer explained that "the term, 'Quality Assurance' is a term that's normally associated with what we do in our construction area, our construction field offices. . . . " (Baer depo., p. 28). Chris Smith,

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[3] Certain other facts relevant to the undersigned's consideration of the motion are discussed in the body of this Report.

Baer's "second-in-command," explained that "[i]n our construction function, they do a lot of quality assurance, making sure that contractors do their job." (Smith depo., p. 36; Baer depo., pp. 40-41).

Baer testified that he actually was looking for people with "engineering on the technical side and the design side, the planning side, one who dealt with production projects" (Baer depo., p. 26), and that he wanted "more than somebody in construction." (Baer depo., p. 29). He explained, "[I]t was obvious to me that the solicitation was attracting the wrong type of applicants. Somebody out there misunderstood the solicitation, what we were looking for." (Baer depo., p. 26). Baer then changed the position title to Technical Quality Manager. (Baer depo., p. 27). He testified that he thought adding the word "technical" would "change[ ] people's perspective as to what the job was[.]" (Baer depo., p. 29).

Smith explained, "Quality assurance is basically a construction function. Quality management is all of our products and services." (Smith depo., p. 37). When asked what "products and services" would be involved in quality management, Smith gave as examples "planning reports, our engineering documents, contract plans and specifications, inspections of completed works, some of our operation functions" such as the quality of recreation sites, including lakes and parks. (Smith depo., pp. 37-38).[4]

Plaintiff was one of the applicants for the Quality Assurance Coordinator position. (Goodin depo., p. 73). Susan Vohlken, the woman who was selected for the position at issue in this litigation, i.e., the Technical Quality Manager position, testified that she did not apply for the Quality Assurance Coordinator position because the original description, i.e., "quality assurance," "had more of a construction focus to it." (Vohlken depo., pp. 57-58).

The vacancy announcement for SCGT04970986, GS-14, Quality Assurance Coordinator I, was cancelled in September 2004. (*See* Def. Ex. 2).[5] The Corps

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[4] The Corps has both civil and military products and services. (Smith depo., p. 39). The military services involve "[m]ostly the contract plans and specifications, and the construction," while the civil "side" involves planning, engineering, contract plans and specifications and construction, but primarily planning and design, with some construction. (Smith depo., pp. 39-40). Smith testified that, "in terms of quality management," he worked on both the military and civil "sides." (Smith depo., p. 40).

[5] Plaintiff asserts that Baer called him into his office and told him he was going to cancel the first announcement and that

> [t]he reasons Mr. Baer gave to Mr. Goodin for the cancellation at this late date and readvertisement of the same position did not make any sense to Goodin and Mr. Goodin expressed those concerns to Baer.

(Pl. SMF, ¶ 17). Plaintiff cites his own deposition testimony at page 106 as support for this statement, but the undersigned notes that at this point in his deposition, Plaintiff did not testify that Baer gave him any reasons for the cancellation or that

(Continued on following page)

then advertised the Technical Quality Manager position, GS-14. (Def. Ex. 3).[6]

Mr. Baer received a list of applicants along with their resumes for the newly advertised position. (Def. SMF, ¶ 9). Baer assembled a selection panel to evaluate the candidates for the position. (Baer depo., p. 45;

Plaintiff expressed concerns to Baer about Baer's actions. (Goodin depo., p. 106). Plaintiff did testify, however, that Baer never told him that he was re-advertising the position because he wanted a female in the position. (*Id.*). On pages 74 through 75 of his deposition, Plaintiff testified that Baer told him he was going to cancel the position because "the people were too technical, not what he was after," and that this explanation "didn't make any sense" to Plaintiff, and that Plaintiff disagreed with Baer's reasoning. Plaintiff's suspicions about Baer's motives do not, without more, create a triable issue of fact as to whether the decision to select Vohlken was discriminatory, however.

[6] Citing Baer's deposition testimony at page 26, Plaintiff asserts that "the changes in the job announcement, though minor, emphasized civil works planning experience and sought to deemphasize military construction experience," (Pl. SMF, ¶ 22). The undersigned notes that Baer testified he "did not want to eliminate people with construction backgrounds," but he was looking for persons with experience in "engineering on the technical side and the design side, the planning side, one who dealt with production projects." (Baer depo., p. 26). Plaintiff also makes the conclusory assertion, with no citation to record evidence, that "[i]n other words, the changes made in the job posting emphasized Vohlken's planning experience while deemphasizing Goodin's strong military construction background," and that Vohlken's "experience was extensively in civil works planning, not military construction." (Pl. SMF, ¶¶ 22-23). These conclusory assertions are insufficient to create a triable issue of fact. *See Evers*, 770 F.2d at 986. Plaintiff's assertions about his qualifications relative to Vohlken's are discussed more extensively in the body of this Report, *infra*.

Ray depo., pp. 11-12; Def. Ex. 4). Besides Baer (who was the selecting official), the selection panel included the following members: 1) Gregory Melton, Senior Economist, Planning COP; 2) Sharon Bond, Chief Civil Works; 3) Curtis Flakes, Chief, Planning Division SAM; 4) Lyn Richardson, Chief, Business Technical Division, LRD; and 5) Christopher Smith, Chief Business Technical Division, SAD. (Def. SMF, ¶ 11).

On November 16, 2004, Baer forwarded a copy of the resumes, recruitment announcement, job description, selection criteria, and matrix of applicants to the selection panel and asked the panel members to rank the candidates. (Def. SMF, ¶ 12; *see also* Def. Ex. 4). After reviewing the material, each panel member independently ranked the applicants and sent the results to the selection official, Baer. (Def. SMF, ¶ 13). Baer ranked Vohlken first and Plaintiff second on the basis of his assessment of their resumes. (Baer depo., pp. 96-97; Def. Ex. 5). Baer testified that it was a "close call" for him because both Plaintiff and Vohlken have technical experience, but Vohlken had a diversity of experience, including planning, regulatory, construction and engineering experience. (Baer depo., pp. 96-97).[7] Vohlken also had a master's degree in

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[7] Plaintiff had worked for the Corps since 1981 (Goodin depo., p. 12), and Vohlken had worked for the Corps since the early 80's. (Vohlken depo., pp. 17-18). Vohlken was already a GS-14 when she applied for the position at issue in this case.

Public Administration[8] and had been through the Army's LDP program. (Baer depo., pp. 98, 120). Baer testified that Vohlken's master's degree in Public Administration "increased her ability to actually deal with people, interface with people, give presentations, organize things." (Baer depo., p. 120).

After receiving the rankings from the panel members, Baer consolidated the results onto a matrix and sent the matrix to the panel members. (Def. SMF, ¶ 14). Based upon the applicants' resumes, the selection panel ranked Susan Vohlken first with a score of 11, and Plaintiff was ranked second, with a score of 16. (Def. SMF, ¶ 15; *see also* Def. Ex. 5). On the basis of the overall rankings, the selection panel decided to interview four people for the position of Technical Quality Manager – Vohlken, Plaintiff, Randy Sitton and Edward Rozenblatt. (Def. SMF, ¶ 16; *see also* Def. Ex. 5).

On January 21, 2005, the selection panel interviewed Vohlken, Plaintiff and Sitton for the position of Technical Quality Manager. (Def. SMF, ¶ 17). Although Baer had intended to participate in the interviews, he was unable to do so because of a family emergency. (Def. SMF, ¶ 20). Chris Smith chaired the selection panel in Baer's absence. (*See* Def. Ex. 7). Rozenblatt declined the interview because he was selected for another position. (Def. SMF, ¶ 18). In addition to the above-listed panel members, Barbara

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[8] Plaintiff has a bachelor's degree. (Goodin depo., p. 6).

Ray, the Director of Human Resources for SAD, and Waldon Parker, EEO representative, were asked to participate as observers during the interviews "to make sure that all of the candidates were treated the same, asked the same questions in the same manner, were not given any preferential treatment." (Def. SMF, ¶ 19).

The panel members had a standard list of questions that they asked all three candidates. (Def. SMF, ¶ 21).[9] After the panel members finished interviewing each candidate, each member rated the applicant with a numerical score based upon his or her answers to the questions. (Def. SMF, ¶ 22). Three out of the five panel members gave Plaintiff the lowest numerical score based upon his answers to the interview questions, and the other two panel members ranked Plaintiff second. (Def. SMF, ¶ 23). By contrast, the panel members unanimously gave Ms. Vohlken, who was ultimately selected, the highest numerical score based upon her answers to the interview questions. (Def. SMF, ¶ 24; *see also* Def. Ex. 8). Plaintiff ranked third, or last, of the three applicants, and Vohlken ranked first. (Def. SMF, ¶ 25).

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[9] Plaintiff asserts that "none of the interview questions that were provided to the selection panel by Baer/Smith dealt with military construction and only one question even mentions construction at all squeezed in with other areas." (Pl. SMF, ¶ 36). The undersigned notes that most of the 11 questions asked were of a general nature, concerning the applicants' talents, short-term and long-term objectives, building teamwork, dealing with change, etc. and they do not appear to stress any particular type of experience. The first question, however, states:

> This position serves as the Technical Quality Manager for CW and Military/HTRW programs. As such, the person selected will provide quality management advice and oversight on all aspects of the Planning, Design, and Construction activities within the SAD Region. Please briefly describe key past assignments and associated responsibilities which you believe make you highly qualified for this position.

(Def. Ex. 6). The applicants were also asked if there was "anything else you would like us to know about you and your qualifications for this position." (*Id.*)

Chris Smith wrote a memorandum on January 24, 2005 in which he summarized the interviews. (Def. Ex. 7). With respect to Plaintiff's interview, Smith wrote:

> [H]is interview was very quick and shallow. Mr. Goodin was 'low energy,' made poor eye contact and did not address the questions very well. He did not convey specifics and referred often to his resume. Mr. Flakes commented after the interview that 'he [Steve Goodin] must have assumed that we knew him.' Mr. Goodin's interview lasted about 15 minutes. Mr. Goodin did not sell himself to the panel or convey passion for the position.

(*Id.*). Smith wrote about Vohlken's interview:

> [A] very good and broad interview. Ms. Vohlken made good eye contact, addressed the questions specifically. She was thoughtful in her responses and conveyed the breadth of her experience and insight to

> what she might bring to the position. She focused on the position and how her experience might fit the job. She thought about how she would perform the job. The panel was impressed by her interview.

(*Id.*). Finally, with respect to Mr. Sitton, Smith wrote:

> [H]is interview has 'high energy,' but kept focusing on construction and 'the field' and the need 'for training.' Mr. Sitton did not convey the experience in civil works or other functional areas that would be required of the position. Mr. Flakes and Mr. Melton expressed disappointment in the interview, as Mr. Sitton was their top candidate prior to the interview. He was basically one dimensional in his responses, focusing on construction.

(*Id.*).[10]

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[10] In response to Def. SMF, ¶ 26, Plaintiff contends that "Smith wrote his memorandum knowing that Goodin had previously expressed concerns that Baer and Smith had preselected Vohlken." In Pl. SMF, ¶ 30, Plaintiff asserts that he "directly expressed his concerns to Chris Smith. . . . " While Plaintiff cites to Smith's deposition testimony at page 59 as support for these assertions, that testimony shows only that "[Plaintiff] approached [Smith] about the type of questions that the interview panel might ask," and that Smith recalled no concerns about the convening of a second panel. (Smith depo., p. 59). Smith also testified that "[t]here were no preferred candidates," including Vohlken. (Smith depo., p. 60). Furthermore, Plaintiff himself testified that he did not have any discussions "of any substance" with any of the supervisors or panel members prior to the interview. (Goodin depo., p. 88).

(Continued on following page)

Barbara Ray, who observed the interviews, testified that in her professional opinion:

> [Plaintiff] did not fully answer all of the questions that were asked of him. When he came into the room he seemed to be like he had a low energy level, he didn't seem to be with it. He just didn't answer all of the questions, I didn't think, to the best of his ability.

(Ray depo., pp. 78-79). By comparison, she testified, "[Vohlken's] energy level seemed to be higher and I thought that she did a better job in answering the questions." (Ray depo., p. 79).[11]

The panel members gave Vohlken the highest numerical score based upon her answers to the interview questions. (Def. SMF, ¶ 27). After the interviews, "there was little deliberation among panel members

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Plaintiff's assertions about his concern that Vohlken had been "preselected" by Baer and Smith do not controvert the fact that no member of the selection panel selected Plaintiff as his or her first choice following the interviews and that the panel members unanimously selected Vohlken as their top choice for the position following the interviews.

[11] Plaintiff disagreed with Smith's summaries, although he acknowledged, "I did okay [during the interview] but I was discouraged so I doubt if it was my best." (Goodin depo., pp. 107-109). Plaintiff took issue with Smith's characterization of Plaintiff as "low energy" and explained that "[j]ust because I'm quiet and reserved, he's interpreting as low energy." (*Id.* at 110-11). He also noted that he had not seen that characterization on any other panel member's comments. (*Id.* at 111). He testified that he had seen other analyses of his interview indicating that he gave short comments or short answers. (*Id.* at 109).

about the candidates, interviews and resumes[; a] ballot was taken and Ms. Vohlken was unanimously voted to be offered the position." (Def. SMF, ¶ 28).

After the panel members completed their evaluations and recommendations, Baer met with Christopher Smith to discuss the results. (Def. SMF, ¶ 30). Baer accepted the panel's recommendation and selected Vohlken for the Technical Quality Manager position. (Smith depo., pp. 56-57; Baer depo., p. 118). Baer wrote a memorandum to then-Colonel (now General) Michael Walsh, who concurred with the selection. (Smith depo., pp. 56-57; Baer depo., p. 58).

On April 29, 2005, Plaintiff filed a formal EEO complaint of discrimination when he was not selected for the position of Technical Quality Manager. (Def. SMF, ¶ 32). An investigation of Plaintiff's EEO complaint was conducted by the Department of Defense Office of Complaint Investigations. (Def. SMF, ¶ 33). At the conclusion of the investigation, Plaintiff requested a hearing before an Equal Employment Opportunity Commission ("EEOC") administrative judge. (Def. SMF, ¶ 34). On April 21, 2006, the EEOC administrative judge issued a final order dismissing the case because Plaintiff filed a complaint in the United States District Court for the Northern District of Georgia, alleging unlawful employment practices based on sex. (Def. SMF, ¶ 35).

III. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." "According to the Supreme Court:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

Young v. General Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), *cert. denied*, 488 U.S. 1004 (1989). "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). In determining whether the moving party has demonstrated that no genuine issue of material fact exists in a case, the court views the evidence and all facts in the case in the light most favorable to the party opposing the motion. *See Frederick*, 246 F.3d at 1309; *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987); *Thrasher v. State Farm Fire & Casualty Co.*, 734 F.2d 637 (11th Cir. 1984).

If the party seeking summary judgment meets the initial burden of demonstrating that there is no genuine issue of material fact, the burden then shifts to the non-moving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991), *cert. denied*, 506 U.S. 952 (1992). "A nonmoving party, opposing a motion for summary judgment supported by affidavits[,] cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial." *Id.* (citation omitted). The evidence "cannot consist of conclusory allegations or legal conclusions." *Id.* (citation omitted). Furthermore, unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984).

IV. Discussion

Plaintiff alleges that Defendant failed to promote him to the position of Technical Quality Manager because of his sex in violation of Title VII.

A. Analytical Framework for Title VII Disparate Treatment Claims

Title VII provides, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. §2000e-2(a)(1). A plaintiff alleging disparate treatment under Title VII may prove his claim in more than one way. First, he may produce credible direct evidence of discriminatory intent. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000). Direct evidence of discrimination is evidence that, if believed, would establish without inference or presumption that the employer's decision was based upon discriminatory intent. *Id.* If a plaintiff produces direct evidence, the burden then shifts to the defendant to prove by a preponderance of the evidence that the same employment decision would have been reached in the absence of the discriminatory intent. *See Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982).

A Title VII plaintiff may also prove his case through circumstantial evidence under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Cmty. Affairs* *v. Burdine*, 450 U.S. 248 (1981).[12] *See Joe's Stone Crab*, 220 F.3d at 1286. To establish a prima facie circumstantial case of sex discrimination, a plaintiff "'must show: (1) [ ]he is a member of a protected class; (2) [ ]he was subjected to adverse employment action; (3) [his] employer treated similarly situated [fe]male employees more favorably; and (4) [ ]he was qualified to do the job.'" *Id.* (quoting *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999)).

If a plaintiff presents a *prima facie* case through circumstantial evidence, "the defendant must 'articulate some legitimate, nondiscriminatory reason for the [adverse employment action].'" *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1310 (11th Cir.) (quoting *McDonnell Douglas*, 411 U.S. at 802), *modified*, 151 F.3d 1321 (11th Cir. 1998); *see also Joe's Stone Crab*, 220 F.3d at 1286. If the defendant satisfies this rebuttal burden by producing evidence of a legitimate rationale for its decision, the plaintiff "then has the ultimate burden of proving the reason to be a pretext for unlawful discrimination." *Joe's Stone Crab*, 220 F.3d at 1286. In *Burdine*, the Supreme Court explained that after the defendant employer articulates a legitimate, non-discriminatory reason for the employment decision,

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[12] The method of proving unlawful discrimination using the burden-shifting scheme discussed above is frequently referred to as the *McDonnell Douglas* or *McDonnell Douglas/Burdine* framework or burden-shifting analysis. *See, e.g., Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1315 (11th Cir. 2002); *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 510 (11th Cir. 2000).

> [the plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination. [He] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256. The Court explained further in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508-09 (1993), that the jury's disbelief of the employer's proffered explanation does not mandate a finding of intentional discrimination but rather *permits* the jury to make that finding. The Court elaborated:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. . . .

Hicks, 509 U.S. at 511 (footnote omitted) (emphasis in original). *Accord Hall v. Ala. Ass'n of School Bds.*, 326

F.3d 1157, 1167 (11th Cir. 2003) ("[T]he mere disbelief of the employer's proffered reason does not 'compel' a finding of discrimination.").

B. **Plaintiff's *Prima Facie* Case**[13]

A Title VII plaintiff may present a *prima facie* case of promotion discrimination by establishing the following elements:

> 1) [ ]he is a member of a protected class under Title VII; 2) [ ]he was qualified for the employment position in question; 3) [ ]he applied for the employment position in question and was rejected; and 4) the employment position remained open or was filled by a person outside the protected class to which the plaintiff belongs.

Walker v. Mortham, 158 F.3d 1177, 1179 n.2 (11th Cir. 1998), *cert denied*, 528 U.S. 809 (1999).

Defendant concedes that Plaintiff has established a *prima facie* case (Def. br., p. 6), and the undersigned agrees. Plaintiff has shown that he is a man; he was qualified for the position of Technical Quality Manager as evidenced by the fact that he was interviewed for the position; he applied for the position and was rejected; and the position was given to Susan Vohlken, a woman.

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[13] Plaintiff does not point to direct evidence of discrimination, but instead relies on the *McDonnell-Douglas/Burdine* burden-shifting framework for proving a circumstantial case of discrimination.

C. Legitimate, Non-Discriminatory Reason For Employment Decision

The employer's burden to articulate a legitimate, non-discriminatory reason for its employment decisions is one of production, not persuasion. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1331 (11th Cir. 1998). This burden is "exceedingly light." *Turnes v. Amsouth Bank, N.A.*, 36 F.3d 1057, 1060-61 (11th Cir. 1994) (citations omitted).

Defendant articulates as its reason for not selecting Plaintiff for the Technical Quality Manager position the fact that the "selection panel, on which the selecting official relied, believed that Ms. Vohlken was the most qualified person for the job." (Def. br., p. 6). Baer, the selecting official, testified that during the selection panel's initial review of the candidates' qualifications in light of the selection criteria, Baer ranked Vohlken first and Plaintiff second because Vohlken had a diversity of experience, including planning, regulatory, construction and engineering experience. (Baer depo., pp. 96-97). Vohlken also had a master's degree in Public Administration and had been through the Army's LDP program. (Baer depo., pp. 98, 120). Baer testified that Vohlken's master's degree in Public Administration "increased her ability to actually deal with people, interface with people, give presentations, organize things." (Baer depo., p.

120). Vohlken also ranked first overall among the panel members when all of the scores were combined, and Plaintiff came in second. (Def. SMF, ¶ 15; Def. Ex. 5). The selection panel, except Baer, then interviewed the top candidates, including Vohlken and Plaintiff, and the panel unanimously selected Vohlken as the top candidate. (Def. SMF, ¶ 24; *see also* Def. Ex. 8). Plaintiff was not ranked first by any member of the panel. (*See* Def. SMF, ¶ 23).

The undersigned finds that Defendant has met the "exceedingly light" burden of articulating a legitimate, non-discriminatory reason for the selection of Vohlken over Plaintiff.

D. Pretext

Because Defendant has articulated a legitimate, non-discriminatory reason for selecting Vohlken over Plaintiff for the Technical Quality Manager position, Plaintiff must "come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision" in order to survive summary judgment. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc) (quoting *Combs v. Plantation Patterns, Meadowcraft, Inc.*, 106 F.3d 1519, 1528 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998)). The court's role at this juncture is to "evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (citation and internal quotation marks omitted). "[E]vidence sufficient to discredit a defendant's proffered nondiscriminatory reasons for its actions, taken together with the plaintiff's prima facie case, is sufficient to support (but not require) a finding of discrimination." *Id.* at 1535. "A reason is not pretext for discrimination 'unless it is shown both that the reason was false, and that discrimination was the real reason.'" *Brooks v. County Comm'n*, 446 F.3d 1160, 1163 (11th Cir. 2006) (quoting *Hicks*, 509 U.S. at 515).

Plaintiff asserts as evidence of pretext: 1) his allegedly superior qualifications for the position; 2) the posting and re-posting of the position; 3) the allegedly improper involvement of Baer as selecting official; 4) the addition of selection panel members who had worked with Vohlken; 5) Corps policy regarding the use of interviews; and 6) an alleged statement by Chris Smith that purportedly evidences a discriminatory motivation for the selection. (*See* Pl. br., pp. 7-11).[14]

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[14] Plaintiff also cites as evidence of pretext the "fact" that "Jim Truelove, one of the primary applicants for the first posting . . . elected not to submit an application for the second position because it was evident that Baer had preselected Vohlken for

(Continued on following page)

1. Relative Qualifications

As part of his discussion of his *prima facie* case, Plaintiff argued that there is "a genuine issue of material fact as to whether Goodin was more qualified for the position." (Pl. br., p. 7). In support of this

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the position. . . ." (Pl. br., p. 11). Plaintiff fails to cite to record evidence in support of this assertion. In his statement of material facts, however, Plaintiff asserts that Truelove was concerned about the re-posting and did not apply for the second posting "because it was evident to him that Baer had preselected a particular candidate for the job and applying would be futile." (Pl. SMF, ¶ 28). Plaintiff cites the unsworn statement of James Truelove (Pl. Ex. 12) in support of this assertion. Pretermitting the issue of whether the "facts" in Truelove's statement would be admissible, *see* Fed. R. Civ. P. 56(e)(1), the undersigned notes that Truelove offers no factual basis for his, and Plaintiff's, speculation "that perhaps they (Greg and/or others in SAD) had someone in mind that had not made the original list and had readvertised in an effort to get their name on the list of qualified candidates." (*Id.*). Truelove's subjective belief that it would be futile to apply does not create an issue of fact on whether Vohlken was "pre-selected" for the position and does not constitute evidence that the selection of Vohlken was discriminatory.

Although he does not discuss this point in his brief, Plaintiff asserts in Pl. SMF, ¶ 29, in an apparent effort to discredit Baer, that "Baer was more than 'friends from a business perspective'" with Vohlken. He cites to an e-mail containing a joke with sexual overtones that Baer forwarded to Vohlken and Robert Fulton, another employee, on May 15, 2006. (Ex. 1 to Baer depo.). The fact that Baer sent this e-mail to Vohlken and a male employee does not controvert Baer's testimony that he is "[f]riends, from a business perspective," and that he does not see Vohlken socially outside of work (Baer depo., pp. 62-63), nor does it cast doubt on Baer's reasons for selecting Vohlken rather than Plaintiff.

contention, Plaintiff asserts "that military construction experience was indeed a primary factor for the position despite Baer's attempt to conceal that fact." (Pl. br., p. 7). He continues, "Indeed, military construction was strongly emphasized because the Corps was undertaking the largest military construction since World War II. . . ." (*Id.*). Plaintiff also cites his years of service in the Centers for Standardization (for Military Construction) in contrast to Vohlken's lack of military construction experience. (*Id.*). Finally, Plaintiff asserts that following the promotion, "Baer assigned Vohlken significant military construction work, even taking away responsibilities from Goodin's present job to do so." (*Id.*). Plaintiff also cites to his superior military construction experience in his discussion of pretext. (*Id.* at 10). Plaintiff does not, however, cite to record evidence in support of these contentions.[15] In his statement of material facts, Plaintiff makes several assertions concerning military construction projects undertaken by the Army

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[15] The undersigned notes that throughout Plaintiff's brief, he makes several factual assertions with no citation to the record. While it might be the case that there is record support for these assertions, or that Plaintiff has provided support for these assertions in his statement of material facts or in response to Defendant's statement of material facts, the court and Defendant are not required, and should not be expected, to sift through the record and the statements of material facts to determine whether there is record support for assertions made in the brief. Plaintiff's counsel is cautioned that in the future, factual assertions made in the brief should be supported by citations to the record.

Corps of Engineers and his own experience in military construction in contrast to Vohlken's experience in civil works planning. (*See, e.g.*, Pl. SMF, ¶¶ 2, 23-25, 27, 61-67, 69-70). Putting aside the question whether Plaintiff's assertions are supported by record evidence, the undersigned finds that these assertions do not create an issue of fact on whether Defendant's reasons for selecting Vohlken over Plaintiff for the position at issue are pretextual.[16]

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[16] Plaintiff's assertion, without citation to the record, that following the promotion, "Baer assigned Vohlken significant military construction work, even taking away responsibilities from Goodin's present job to do so" (Pl. br., p. 7), is unsupported by Plaintiff's statement of material facts. Plaintiff alleges that "[i]mmediately after Vohlken was promoted to the . . . Quality Technical Manager's position, Baer began assigning her projects that were intimately related to military construction, despite the fact that his stated reason for re-posting the job was to locate candidates with less experience in military construction." (Pl. SMF, ¶ 57). Plaintiff fails to cite to any evidence in support of this statement, however, and therefore, it is insufficient to create a triable issue of fact on pretext. Plaintiff also asserts statements of "fact" about an attempted "downgrading" of his position (*see, e.g.*, Pl. SMF, ¶¶ 58-62), but those statements are either unsupported by citations to the record or unsupported by the evidence cited (*see, e.g.*, Pl. SMF, ¶¶ 58-59), or they fail to support the assertion in Plaintiff's brief that Baer began assigning Vohlken military construction projects (*see, e.g.*, Pl. SMF, ¶¶ 60-62; *see also* Pl. Ex. 27). However, even if it is the case that Vohlken was assigned to projects involving military construction, that fact would not cast doubt on Baer's explanation that he favored a person with a breadth of experience, including planning experience, for the position, given that the position is responsible for more than military construction projects. (*See* Smith depo., pp. 37-40).

When a plaintiff attempts to demonstrate pretext by contending that he was more qualified than the successful candidate, he "must show that the disparities between the successful applicant's and [his] own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" *Brooks,* 446 F.3d at 1163 (quoting *Cooper v. Southern Co.,* 390 F.3d 695, 732 (11th Cir. 2004), *cert. denied,* 546 U.S. 960 (2005), and citing *Ash v. Tyson Foods, Inc.,* 546 U.S. 454 (2005) (per curiam) (noting that Court approved this language from Cooper)).[17] The undersigned evaluates Plaintiff's arguments under this standard.

The undersigned finds that Plaintiff's assertions about his allegedly superior qualifications do not demonstrate that Defendant's articulated reasons for selecting Vohlken are pretextual. Plaintiff has not controverted the fact that Baer initially rated Vohlken as the top candidate based on the diversity of her experience and her superior education, nor has he controverted the fact that Vohlken's overall rating by the selection panel was the highest of all the candidates, including Plaintiff, both before the interviews (based on the panel members' reviews of the resumes and selection criteria) and after the interviews. In fact, Vohlken was unanimously recommended as the top candidate after the interviews.

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[17] In *Ash,* the Supreme Court disapproved of the court's language in *Cooper* that "[p]retext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'" *Ash,* 126 S.Ct. at 1197-98.

Plaintiff essentially attempts to demonstrate pretext by questioning the wisdom of the decision to emphasize breadth and diversity of experience, including planning experience, over military construction experience, and by questioning the reliance on the applicants' interpersonal qualities and ability to communicate and answer questions with specific information during the interviews.[18] But Plaintiff's own beliefs about the proper criteria are irrelevant and do not controvert the reasons articulated by Baer for selecting Vohlken, i.e., her diversity of experience, including planning, regulatory, construction and engineering experience and her master's degree in Public Administration, as well as the selection panel's unanimous assessment of her as the superior candidate. "A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer." *Chapman,* 229 F.3d at 1030. "Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Id. Accord Brooks,* 446 F.3d at 1163 ("In the context of a promotion: 'a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the officer who received the position he coveted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by [discriminatory animus]' ") (quoting *Alexander v. Fulton County, Georgia,* 207 F.3d 1303, 1339 (11th Cir. 2000)).

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[18] Plaintiff testified that he believes "a lot" of the factors the interviewers considered, such as not making eye contact or having low energy, were "stupid" and "frivolous." (Goodin depo., pp. 175, 178).

While Plaintiff may believe that his military construction experience should have weighed more heavily in the decisionmaking, given the military construction projects in which the Corps is involved, the Eleventh Circuit made clear in *Cofield v. Goldkist, Inc.,* 267 F.3d 1264 (11th Cir. 2001) that the employer is free to choose its own non-discriminatory selection criteria: "We will not second guess [Defendant's] decision to emphasize qualifications over length of service." *Cofield,* 267 F.3d at 1269. *See also Norrell v. Waste Away Group, Inc.,* 246 F.Supp.2d 1213, 1223 n.12 (11th Cir. 2003) ("This high standard for establishing discrimination based on the relative qualifications of the competitors for a promotion serves the purpose of keeping the federal courts from second-guessing decisions made by employers in the course of their business.").

Given the reasons cited by Baer for selecting Vohlken, the undersigned finds that a reasonable jury could not find that "the disparities between [Vohlken's] and [Plaintiff's] own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" *Brooks,* 446 F.3d at 1163 (citations omitted). Thus the relative qualifications of Plaintiff and Vohlken do not create a triable issue on the question whether Baer's reasons for selecting Vohlken were a pretext for discrimination. *See Brooks,* 446 F.3d at 1163-64.

2. Re-posting of Position

Plaintiff also asserts as evidence of pretext "the posting and re-posting of a nearly identical job coincidentally at the exact same time Vohlken was becoming available . . . [with] changes [that] just happened to emphasize Vohlken's experience." (Pl. br., p. 10). Plaintiff fails to cite to the record in support of these assertions, but they appear to relate to Plaintiff's suspicions that the job was re-posted in order to give Vohlken an opportunity to apply. (*See* Goodin depo., pp. 74-75, 106). Plaintiff's suspicions concerning Baer's decision to re-post the position to change the title, i.e., from Quality Assurance Coordinator to Technical Quality Manager, in order to attract candidates with different experience, do not create an issue of fact on pretext. Plaintiff has not rebutted Baer's explanation for why he was not satisfied with the applicants when the position was advertised as Quality Assurance Coordinator, i.e., that many of the applicants for the original position had primarily a construction background, and he believed that the

"Quality Assurance" term was attracting persons with construction experience but not persons with broader experience, including "engineering on the technical side and the design side, planning side, one who dealt with production projects." (Baer depo., p. 26). While Plaintiff may question the wisdom or timing of Baer's actions, Plaintiff has not shown that Baer's explanation for why he re-posted the position was false, and Plaintiff's suspicions about the timing of the decision to re-advertise the position, or the content of it, do not demonstrate pretext. *See, e.g., Burstein v. Emtel, Inc.,* 137 Fed. Appx. 205, 209 (11th Cir. 2005) (unpublished decision) ("Emtel's subsequent offering of a contract to Burstein . . . might appear suspicious. This fact, however, does not show that Emtel's reasons were a pretext for religious *discrimination*" (emphasis in original)); *Blair v. Atlanta Gastroenterology Assocs.,* No. 1:05-CV-2811-TWT, 2007 U.S. Dist. LEXIS 48556, at *39 (N.D. Ga. July 2, 2007) ("Given the incidents of Blair's unprofessional behavior provided by the Defendant, the Court finds that Blair's claim that the timing of his firing was suspicious is insufficient to demonstrate pretext"); *Mariano v. Potter,* No. 04-0776-WS-B, 2006 U.S. Dist. LEXIS 17848, at *13 (S.D. Ala. Apr. 7, 2006) ("A 'mere suspicion' of discrimination will not support pretext . . . ").

3. Baer's Involvement as Selecting Official

Plaintiff contends that "within 30 days the H.R. Director of the South Atlantic Division drafted a 'clarification' of the personnel regulation to cover up the fact that Baer should not have been the selecting official, the supervisor, and the Chair of the Selection panel. . . ." (Pl. br., p. 10). Plaintiff again fails to cite to the record in support of these assertions. In his statement of material facts, however, Plaintiff asserts that in accordance with ER 690-1203-1 ("Corporate Recruitment and Selection"), General Michael Walsh, "the new SAD commander, should have been the selecting official, not Baer." (Pl. SMF, ¶ 8; *see also* Pl. SMF, ¶ 7; Pl. Ex. 10-11). That regulation states that it applies to the selection of GS-15 and Supervisory GS-14 (or equivalent) positions. (Pl. Ex. 10). Barbara Ray, the Director of Human Resources for the South Atlantic Division, testified:

> Within the Corps of Engineers there is a regulation that's called corporate selection policy or corporate selection regulation, and it sets forth the steps that a panel or that a supervisor must take to fill a position at the supervisory GS-14 level and above. For those type of positions, you must follow the procedures set forth in that regulation.

(Ray depo., pp. 5, 12). Ray also testified that the position at issue was not a supervisory GS-14 position, and that Baer was not required to follow the corporate selection policy for the position. (Ray depo., pp. 36-39, 64).[19] Baer also testified that the position is not a supervisory GS-14 position. (Baer depo., pp. 105-107, 109).[20] Although Plaintiff asserts in his notice of objection [*see* Doc. 69] that the position at issue "was a GS-14 or 'equivalent'" (Doc. 69, p. 4), the regulation applies to a *supervisory* GS-14 or its equivalent, and Plaintiff has pointed to no evidence that the GS-14 position at issue was a supervisory GS-14 or was equivalent to a supervisory GS-14 position.[21] Plaintiff has failed to point to evidence that shows that the regulation governed the selection at issue.[22] Accordingly, the undersigned finds that Plaintiff has failed to demonstrate the existence of an issue of fact on whether Baer improperly acted as the selection official for the selection of the Technical Quality Manager position.

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[19] Ray explained that a supervisor could still convene a selection panel as required in that policy even if the position was not covered by the policy, and that many managers prefer to have a panel so that they are not the only person involved in making the employment decision. (Ray depo., pp. 39-40, 81).

[20] Plaintiff also asserts that Baer "empanelled a 'selection committee' under ER 609-1203-1[sic]" (Pl. SMF, ¶ 10). However, he provides no citation to record evidence that the selection committee was formed pursuant to that regulation, or that the regulation applied to the selection at issue.

[21] Ray explained that the phrase "or equivalent" referred to "positions that were not graded as GS and a number, but were already into [pay] bands." (Ray depo., p. 15).

[22] For the same reason, Plaintiff's assertions about an alleged "cover up" through the drafting of a clarification of that regulation (*see* Pl. br., p. 10; Pl. SMF, ¶¶ 40-50; *see also* Ex. 2 to Walsh depo.) are not relevant and do not demonstrate pretext.

Moreover, even if Baer mistakenly acted as the selecting official, such a mistake does not demonstrate pretext. In *Chapman,* the court reiterated that:

> [F]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the [law prohibiting discrimination] does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior.

Chapman, 229 F.3d at 1030 (quoting *Elrod v. Sears, Roebuck & Co.,* 939 F.2d 1466, 1470 (11th Cir. 1991) (internal quotation marks omitted)). *See also Curtis v. TeleTech Customer Care Mgmt., Inc.,* 208 F.Supp.2d 1231, 1245 (N.D. Ala. 2002) ("[P]roving pretext requires more than showing that the employer was wrong in its assessment of the underlying facts or was otherwise lacking in wisdom").

Furthermore, while it is true that an employer's deviations from its policies may constitute evidence of pretext, *see, e.g., Hurlbert v. St. Mary's Health Care Svs., Inc.,* 439 F.3d 1286, 1299 (11th Cir. 2006), "[s]tanding alone, deviation from a company policy does not demonstrate discriminatory animus." *Mitchell v. USBI Co.,* 186 F.3d 1352, 1355-56 (11th Cir. 1999). *See also Boykin v. Bank of Am. Corp.,* 162 Fed. Appx. 837, 839 (11th Cir. 2005) ("Although departures from normal procedures may be suggestive of discrimination . . . , the mere fact that [an employer] failed to follow its own internal procedures does not necessarily suggest that [it] was motivated by illegal discriminatory intent" (internal citations and quotation marks omitted)) (unpublished decision), *cert. denied,* ___ U.S. ___, 126 S. Ct. 2931, 165 L. Ed. 2d 977 (2006); *Brown v. Marriott Int'l, Inc.,* No. 1:04-CV-3255-WSD, 2006 U.S. Dist. LEXIS 56426, at *32 (N.D. Ga. June 15, 2006) ("Absent other evidence, 'deviation from a company policy [alone] does not demonstrate discriminatory animus.'" (quoting *Turner v. Bieluch,* 2004 U.S. Dist. LEXIS 17543, at *13 (S.D. Fla. Aug. 13, 2004))), *adopted by* 2006 U.S. Dist. LEXIS 56441 (N.D. Ga. July 31, 2006).

Plaintiff has not shown that Baer's involvement in selecting Vohlken, even if he should not have been the selecting official, demonstrates discriminatory animus, particularly in light of the input Baer received from the selection panel, whose members unanimously indicated that Vohlken was the best candidate.

4. The Addition of Selection Panel Members

As evidence of pretext, Plaintiff also points, without citation to the record, to "the interesting change in the selection panel from posting one to two in which most members stayed the same, but the members who were added just happened to have worked with Vohlken before. . . ." (Pl. br., pp. 10-11). Plaintiff does not identify the selection panel members involved, or cite to record evidence to support these assertions. However, in his notice of objection [Doc. 69], Plaintiff argues that he identified these members in his response to Def. SMF, ¶ 10 and in Pl. SMF, ¶ 26, and that he cited to record evidence in support of the assertions therein. (Doc. 69, p. 4).

In response to Def. SMF, ¶ 10, Plaintiff asserted that Baer "changed the composition of the selection panel to include two individuals – Mr. Melton and Mr. Flakes – both of whom had extensive experience in civil works planning and knew Susan Vohlken," and he cited Smith's deposition at pages 62-64. Plaintiff repeated that assertion in Pl. SMF, ¶ 26, with the same record citation.

Review of Smith's deposition reveals Smith's testimony that Melton and Flakes had planning experience, but that he does "not have specific knowledge of them working specifically with Ms. Vohlken." (Smith depo., pp. 64-65, 69). Even if they had worked with Vohlken previously, however, Plaintiff has not shown that their evaluations of Plaintiff's and Vohlken's applications and interviews were based on considerations of gender.[23] And even if Baer selected

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[23] The undersigned notes that, even if Melton and Flakes had previously worked with Vohlken, neither of them rated Vohlken as his first choice after reviewing the candidates' resumes. (*See* Def. Ex. 5).

Melton and Flakes because of their planning experience, Plaintiff has not shown that Baer's actions were discriminatory, or that they create an issue of fact with respect to his articulated reasons for selecting Vohlken, i.e., the diversity of her experience, which included engineering, construction and planning. Baer testified that he changed two members of the selection panel because of scheduling conflicts of two of the previous panel members and because he "wanted to bring in somebody, make sure someone from planning participated in it," because "planning and engineering are very closely related with respect to overall Technical Quality Management." (Baer depo., pp. 79-80). Baer's acknowledged interest in having panel members with planning experience is not evidence of pretext.

5. Corps Policy Concerning Interviews

Plaintiff asserts as evidence of pretext "Corps policy setting forth that interviews (Plaintiff's Response to Defendant's Statement of Fact, ¶ 24), a sensible policy considering that the Corps deals with engineers, not actors." (Sic). (Pl. br., p. 11). As an initial matter, the undersigned observes that this statement omits what the policy states. In Plaintiff's response to Def. SMF, ¶ 24, Plaintiff asserts that, according to the corporate selection policy, ER 690-1203-1, "interview results 'should not be given sole weight, but should be considered with the results of other information." (Pl. resp. to Def. SMF, ¶ 24). The undersigned notes that the policy states, "Interview results, both personal and Leadership Competency Interviews, should not be given sole weight, but should be considered with the results of other information, such as reference checks with current and former supervisors and/or peers." (Pl. Ex. 10, ¶ 7b).

The undersigned notes further, as has already been discussed, that Plaintiff has not shown that ER 690-1203-1 governed the selection at issue. Moreover, Baer's decision did not rest solely on the interview results. Prior to the interviews, Baer and the other members of the selection panel evaluated the candidates' resumes in light of the selection criteria, and Vohlken was ranked first following that review. In fact, Baer rated Vohlken first due to her diversity of experience and superior education, as already discussed. The panel members then interviewed Vohlken and unanimously voted for her as the top candidate. Baer's acceptance of the panel's recommendation was not made in a vacuum, but was made in light of his own previous review of the candidates' credentials, and his desire to have a person with Vohlken's breadth of experience in that position. Plaintiff's contentions about Corps policy are not evidence of pretext.

6. Comment by Chris Smith

Plaintiff also points to a comment allegedly made by Chris Smith, the person who acted as chair of the selection panel in Baer's absence, as evidence in support of his *prima facie* case and as evidence of pretext. (Pl. br., p. 8). According to Plaintiff, Smith stated, in connection with his performance evaluation by Baer, that "promoting Vohlken because she was a female was an accomplishment." (*Id.*). Plaintiff has not, in his brief, cited to record evidence in support of this assertion. However, in his statement of material facts, Plaintiff asserts:

> Smith, Baer's chief assistant who was on the selection panel and filled as Chair on the day of the interviews, later testified under oath that he cited his participation in the selection of a female candidate [Vohlken] in this process as an 'achievement' on his year-end performance evaluation, which was, of course performed by Baer.

(Pl. SMF, ¶ 31, citing Pl. Ex. 23).

Plaintiff's record support for this statement, Exhibit 23, consists of what appears to be one page of a transcript of an exchange between a "Mr. Goodin," presumably Plaintiff, and a "Mr. Smith," presumably Chris Smith, although there is nothing in the transcript itself that further identifies the parties to the exchange. Moreover, there is no indication from the exhibit whether the statement was made under oath or what type of proceeding was being transcribed.[24]

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[24] Although Plaintiff's counsel took Chris Smith's deposition during the course of this litigation, he did not question him about this purported testimony.

Even if this exhibit were admissible, a question the undersigned does not decide, it does not demonstrate the existence of a genuine issue of material fact on pretext. According to the exhibit, the following exchange occurred between "Mr. Smith" and "Mr. Goodin":

> Mr. Goodin: So, when you filled out your end of the year performance accomplishments –
>
> Mr. Smith: I had to.
>
> Mr. Goodin: – did you list Susie Vohlken as one of your accomplishments in that arena?
>
> Mr. Smith: That I had participated on panels and, yes, I did hire a white female, correct.
>
> Mr. Goodin: Don't you agree that that gives you points, positive points, that can contribute to your overall performance rating?
>
> Mr. Smith: It was an achievement. So yes, I guess it would be looked favorably upon.

(Pl. Ex. 23).[25] It is unclear from this exchange whether Smith, who was not the decision maker,

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[25] Plaintiff asserts in his notice of objection [Doc. 69] that "Smith stated in his performance review and confirmed sworn testimony before the EEOC that the promotion of a female, Vohlken, was an achievement for which he, and presumably . . . Baer, his immediate supervisor, should receive favorable job

(Continued on following page)

considered his "achievement" to be his participation on the panels or the hiring of a female or both. And even if Smith's alleged statement is construed as an indication that he thought the hiring of a female was an achievement, the statement does not indicate that Smith considered Vohlken to be either less qualified than Plaintiff or undeserving of the position. In fact, Smith testified that the "criteria for selecting candidates for initial positions and promotions" were to select the "[b]est qualified candidate to fill the position." (Smith depo., p. 98). When asked whether minorities and females would have the same "standing" as white males for promotion, Smith responded, "We select the best qualified candidates." (Smith depo., p. 98). Smith testified that when he served as the chair for the interview process at issue in this case, his goal was "[t]o select the best qualified candidate," and that he did "not consider the race, gender, religion, color or any applicants when [he was] serving on the panel or chairing it." (Smith depo., pp. 98-99).

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consideration." (*Id.* at 9). Plaintiff has not pointed to evidence, such as a copy of the performance evaluation or evidence that the quoted exchange in Pl. Ex. 23 is sworn testimony, to support these assertions. That failure is somewhat baffling as, according to Plaintiff, both parties are in possession of the EEOC transcript. (*Id.*). Furthermore, Plaintiff has mischaracterized the exchange: Smith did not state that "the promotion of a female, Vohlken, was an achievement for which he, and presumably . . . Baer, his immediate supervisor, should receive favorable job consideration." To the extent that the court considers Pl. Ex. 23, the exhibit speaks for itself.

The undersigned finds that Smith's purported statement does not create an issue of fact on pretext, in light of the record as a whole. *See Rojas v. State of Fla.,* 285 F.3d 1339, 1343 (11th Cir. 2002). In *Rojas,* the plaintiff alleged that she was fired from her position because of her sex. *Id.* at 1342. The court found that a comment made by the person who fired the plaintiff that a woman named Lane (not plaintiff) "did not deserve her job . . . because Lane was a woman" did not constitute circumstantial evidence of pretext. *Id.* at 1342-43. The court noted that the evidence relating to discriminatory comments must be "'read in conjunction with the entire record' and 'considered together with' the other evidence in the case." *Id.* at 1343 (quoting *Ross v. Rhodes Furniture, Inc.,* 146 F.3d 1286, 1291-92 (11th Cir. 1998)). The court distinguished the *Ross,* case: "In Ross, fairly strong additional evidence supported a finding of pretext. . . ." *Id.* at 1343. However, in *Rojas,* no such additional evidence existed. The court concluded "[b]ecause [the decisionmaker's] comment was (looking at the admissible evidence before the district court) an isolated comment, unrelated to the decision to fire Rojas, it, alone, is insufficient to establish a material fact on pretext." *Id.*

The undersigned notes, first, that Baer, not Smith was the decision maker in this case. Furthermore, like the case before the court in *Rojas,* and unlike the situation in *Ross,* there is not "strong additional evidence support[ing] a finding of pretext" in this case. *Id. See also Scott v. Suncoast Bev. Sales*

Ltd., 295 F.3d 1223, 1227, 1229-30 (11th Cir. 2002) (comment made by person who became plaintiff's supervisor that "[w]e'll burn his black ass" insufficient to create issue of fact as to pretext with respect to plaintiff's termination where there was not "additional persuasive evidence of pretext. . . ."); *Dorrego v. Public Health Trust,* 293 F.Supp.2d 1274, 1287 (S.D. Fla. 2003) (derogatory comments about Hispanic workers made by decisionmaker not sufficient to create issue of fact as to pretext where there was not additional persuasive evidence of pretext). As already discussed, Plaintiff has not controverted Defendant's articulated reasons for selecting Vohlken, and there is not "additional persuasive evidence of pretext," particularly in light of the fact that other persons besides Smith were involved in the decision at issue and were unanimous in their opinion that Vohlken should be selected. Furthermore, although Smith's alleged comment arguably shows that he considered his participation in a process that resulted in the selection of a woman to be positive or worthy of commendation, the comment does not demonstrate an animosity toward Plaintiff because of his sex or show that Smith's evaluation of the candidates was motivated by sex-related animus. For these reasons, the undersigned finds that Smith's comment does not constitute circumstantial evidence of pretext or contribute to a circumstantial case for pretext. *See Rojas,* 285 F.3d at 1342-43.

Plaintiff has failed to show that there is an issue of fact with respect to whether Defendant's articulated legitimate, non-discriminatory reasons for selecting Vohlken for the Technical Quality Manager position instead of Plaintiff were a pretext for unlawful discrimination based on Plaintiff's sex. Accordingly, it is **RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED** on Plaintiff's Title VII sex discrimination claim.

SUMMARY

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [Doc. 41] be **GRANTED** and that Plaintiff's claims against Defendant be **DISMISSED**. The Clerk is **DIRECTED** to terminate the District Court's referral of this action to the undersigned.

IT IS SO REPORTED AND RECOMMENDED, this 28th day of December, 2007.

/s/ Susan S. Cole
SUSAN S. COLE
United States
Magistrate Judge